Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARK E. VREELAND,

Petitioner,

vs.

JAMES TOWNSEND, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. If a plaintiff then temporarily mentally ill, emotionally disturbed, and obviously so, calls the Deputy Sheriff "911" Operators, an agency under a constitutionally and Michigan State Law imposed and recognized duty, not by the operators' hostile, belittling, and denigrating remarks to belittle or ridicule, but to be supportive, and is their failure actionable by both the 14th Amendment as a state abuse of power, denying his emotional well-being, and also by Michigan Law, when intentional or grossly negligent, as stated by a Toledo police officer in regard to the Monroe County, Michigan "911" Operators?

2. When did "911" Operators, by calling Plaintiff 'crazy," and making fun of him to a marked degree, intentionally or grossly negligently, so disturb him and cause him a loss of personal security, and emotional well-being, when he was mentally and emotionally disturbed and vulnerable, and thus not

able to defend himself as a mentally normal person would, with the result that he was caused to leave the safety of his home, and to walk out with an unloaded shotgun, under such circumstances, that the "911" Operators knew that he would be required to confront the Deputy Sheriffs, and then, due to his well-demonstrated stubbornness, and defiance in his mentally disturbed condition, caused by the "911" operators' insults, then point the unloaded gun at the deupties, so as to cause them to shoot him?

3. Does the evidence demonstrate a violation of the Equal Protection of the Law, in showing that the "911" Operators of Monroe, Michigan were helpful and respectful to the intoxicated, or others needing help, but discriminated against the obviously mentally ill, as Plaintiff then most certainly was, although Plaintiff may have been vexing and retaliatory to the "911" Operators' remarks?

4. Was Plaintiff, under a Rule 56(f) ii

motion filed November 4, 1991, before the Magistrate's hearing, after the close of Discovery, and when facing a Summary Judgment Motion, entitled to leave to depose the "911" Operators, and their policy-setting superiors, on their policy, custom, usage, instructions and training, when Plaintiff was represented by the only attorney that he could get, an attorney umfamiliar with the complexities of Section 1983 actions, and the delay of no more than 2 weeks, involved in such requested depositions would not have substantially delayed the judicial processes and decision making in the District Court, by as much as two weeks, and the District Court did not rule until January 27, 1992, two months and 23 days after the Motion?

5. Should the District Court, instead of dismissing the State actions with prejudice, under Federal U.S. Title 28, Section 1367(d) have dismissed the State actions, for slander, defamation, libel, intentional emotional distress, assault and

battery, and any other State grounds, which each involved numerous and significant questions of law, either complex, unsettled, not fully determined, and best decided, by th Michigan Appellate and Supreme Court, have so dismissed, so that Plaintiff could refile his State actions, in the State Court, and not be facing the Statute of Limitations?

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CERTIFICATE OF SERVICE

John G. Rust, Counsel for Petitioner hereby certifies that he, on July 13, 1993, served three (3) copies of the foregoing Petition on Attorney Marcia L. Howe (Lead Counsel), Michael E. Rosati, Esq., Cummings, McClorey, 33900 Schoolcraft, Ste. G-1, Livonia, MI 48150-1392, Attorneys for All Defendnats Except State Trooper Murphy, Brian D. Devlin, Esq., Michigan Department of Attorney General Tort Defense Division, P.O. Box 30217, Lansing, MI 48909, Attorney for Defendant State Trooper Murphy.

Respectfully submitted,

John G. Rust

John G. Rust
Attorney for Petitioner

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FOOTNOTE LIST OF ALL PARTIES.

Mark E. Vreeland,

Petitioner.

v.

James Townsend,

Lynn Hardaway,

Donald Horvath,

Lauwer (first name unknown)

James Gruber,

Richard Sweat,

Vincent Burkey,

Daniel Balino,

Walter Trobridge,

Monroe County Sheriff,

Monroe County Central Dispatch,

9-1-1 Agency or Organization,

Carl VanWerdt,

Henrik Kanavel,

Michael Murphy,

William Frey,

Office of the County Prosecutor,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Mark E. Vreeland does hereby petition the Honorable Supreme Court of the United States to issue in this case a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINION.

No opinions by either the Court of Appeals, nor the District Court, have been published.

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit, judgment herein sought to be reviewed was rendered on April 14, 1993, and on May 27, 1993 the Panel who heard and rendered the judgment herein sought to be reviewed, denied appellant's "Petition For Rehearing En Banc", timely filed on April 28, 1993. See Page App. 21 of the Appendix filed in this Court. The said Petition For

Rehearing En Banc" was intended as a Petition for Rehearing under Federal Rules of Appellate Procedure 40, and complied therewith in the number of pages and in the points of law and Argument provision, reading: ..."The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present."...

In 28 USCS Section 1254, the text reads:

> "§1254. Courts of appeals; certiorari; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." -2-

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions are, in Section 1 and 5, as in the USCS series, as follows:

"AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The relevant Federal statute is, as in the USCS series, 42 USCS Section 1983, which there reads:

"§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, -3-

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)"

STATEMENT OF THE CASE

STATEMENT OF DISTRICT COURT AND APPELLATE JURISDICTION

This appeal arises out of the action filed on April 23, 1990, in the United States District Court for the Eastern District of Michigan, Southern Division, in Ann Arbor, and was later transferred to the Detroit Branch of that District Court. The action is one for personal injuries, denial of constitutional rights, of emotional well-being, and personal security, assault, slander, libel, and intentional tort, by Plaintiff Vreeland, a citizen of Toledo, Ohio,

against the 911 operators, other various Deputy Sheriffs, a Michigan State Trooper Murphy, and the members, of the governing body for the 911 organization. Plaintiff Vreeland's action, arises, when he on April 23, 1988, intoxicated, possibly under the influence of some drugs, and at a time when he was severly emotionally disturbed and temporarily mentally ill, called to the 911 Monroe County Agency, for help, but instead was ridiculed, insulted, slandered and libeled. At that time Petitioner Vreeland was so mentally ill and emotionally disturbed that his mental defenses were very vulnerable, and easily upset and were so caused by the hostile and demeaning treatment by the 911 operators, from whom he had expected help, as the 911 agency held itself out as a "First Call for Help" type of agency. Then 911 insults and ridicules caused Mr. Vreeland to lose even his impaired judgment, which up to then had directed and caused him to remain in the safety of his home. But -5-

with his judgment then further impaired, he was overcome with anger at the 911 insults, and further depressed and incited by the 911 offers to kill him, which appealed to his depressed and self-unworthiness instincts, and all these, and other factors from the 911 attack upon him, caused him to leave his residence and then, while carrying a shotgun, with the breech open, unloaded, was walking down a country road, and while still obviously mentall ill, was stopped by a deputy sheriff, and was about to come to an agreement and terms with him, and then no injury would have befelled him. But two other deputy sheriffs, ran their sheriff's car right at Mr. Vreeland, as described by a State Trooper, as though to hit him, and then Plaintiff became hostile, refused to put his gun down, pointed it at one of the deputies, who thereupon shot him in the left arm, causing permanent injury.

Jurisdiction in the District Court, was based upon Title 28 USC Section 1330, for -6-

diversity of citizens, Plaintiff being an Ohio citizen, and also under Section 1331, as Plaintiff herein claims a denial of constitutional and federal rights.

On January 31, 1992, the Honorable Gerald E. Rosen, United States District Judge, granted the Motions of all Defendants for Summary Judgment, and denied Plaintiff's Motions for Limited Discovery under Rule 56 (F). On Monday, February 10, 1992, Plaintiff timely served a Motion under Rule 59, and also his second Motion for Discovery under Rule 56(F), and the same was timely filed on February 13, 1992.

Plaintiff, then, on Monday, March 2, 1992, timely filed a Notice of Appeal from the District Court Judgment of Dismissal of the action of January 31, 1992, and this appeal then was numbered 92-1341 by the Court of Appeals For the Sixth Circuit, and was then dismissed on April 10, 1992, for the reason that there was then no appealable final order in the District Court. -7- Thereafter, on March

23, 1992, District Judge Gerald E. Rosen, denied Plaintiff's Rule 59 Motion, and for additional discovery udner Rule 56(F), and thereafter timely, Plaintiff filed his Notice of Appeal on April 22, 1992, and that appeal, bears the number 92-1534, the instant appeal. Jurisdiction for this appeal is given by Title 28 USCS Section 1291.

STATEMENT OF THE HISTORY OF THE CASE IN THE DISTRICT COURT:

As stated above, this action was started by the filing of Plaintiff's Complaint on April 23, 1990, at the Ann Arbor Branch of the United States District Court for the Eastern District of Michigan, Southern Division, under an In Forma Pauperis. Thereafter it was referred to the Detroit Branch. The 911 operators, from three of the regular deputies, to the sargeant, and also to the top person in command of that shift, believed to be a lieutenant, either received or learned of Mr. Vreeland's request for help and learned also that he then was obviously

mentally ill. The deputies, then proceeded, however, to call him "crazy", a chimpanzee, implied he was a homosexual, and, in general, ridiculed and showed their hostility and derision toward him. We claim the unprofessional, outrageous, and unacceptable acts by the sheriff deputies, caused him to leave (the safety of his residence, and to walk, with an unloaded, breech-opened shotgun, on one of the country roads. In time, he was seen there by a sheriff deputy, and, at first, this deputy Bellino, and Plaintiff were about to make their peace, and to refrain from violence. Two other sheriff deputies drove their sheriff's car, however, right at the Plaintiff, as though to hit him as described by a State Trooper Brown, for which we claim an assault action, and then, being further made angry, and more emotionally unable to use his judgment, and Deputy Sheriff Bellino then, shot Plaintiff in the left arm, permanently injuring him. Petitioner Vreeland was criminally pro- -9-

secuted for felonious assault, and after an extended time in jail, and after two appointed psychiatrics differed on whether Mr. Vreeland was mentally culpable for his acts, a Plea Bargain was negotiated, but held up by Prosecutor Frey and Michigan State Trooper Murphy because Mr. Vreeland would not sign a civil release. We claim this was an unconstitutional deprivation by the Prosecutor and the State Trooper. In time, the Prosecutor and the State Trooper dropped their demand for a civil release, and immediately a Plea Bargain was struck, and Mr. Vreeland was immediately released. This action is for personal injury, slander, libel, intentional tort, and assault, against multiple Monroe County Deputy Sheriff and 911 personnel, and against Prosecutor Frey and Michigan State Trooper Murphy.

This was the first Section 1983 action handled by this counsel and some fifteen (15) or twenty (20) years had past since this counsel had filed an action in that -10-

Michigan Federal District Cout. No notice was given until much later, after one (1) year had passed, that Defendants Walter Trobridge, 911 Agency, Carl VanWerdt and Henrik Kanavel, had not been served, and they were dismissed by Judge Gerald E. Rosen on June 13, 1991. A scheduling conference was held then on June 26, 1991 and a pre-trial order issued, setting a deadline for Discovery of August 30, 1991. The Monroe County DEfendants were represented by Attorney Michael E. Rosati, and Plaintiff filed Answers to his Interrogatories. On September 5, 1991, Defendant Michael Murphy, by Assistant Attorney General Brian D. Devlin, filed a Motion for Summary Judgment, and also believed to be before the Motion deadline, Attorney, Michael E. Rosati for the remaining Monroe County Defendants, also filed a Motion for Summary Judgment. These two Motions were referred to Judge Magistrate Virginia M. Morgan, and were argued orally before her on November 4, 1991, and a trans-

cript of that oral argument was in the Court of Appeals Appendix. Plaintiff in opposition filed a Brief and Affidavits of Plaintiff, and of this cousnel as to the authenticity of the tape of the proceedings of the 911 organization with Plaintiff, on the night in question of April 23, 1988, and in time a transcript, as prepared by this cousnel's secretary of the said tape, was filed, and appears at Page 58 of the Appendix in this Court. The copy of the tape, is on file with the Clerk, and its authenticity has not been challenged nor questioned by anyone. On November 4, 1991, Plaintiff filed a "Motion Under Rule 56(F) For Leave To Take Depositions of SEveral Key Witnesses, Dealing Primarily With the Instruction, Policies, and Training of the 911 ORganization of Monroe County, and the Supervisor, and Deputies Acting on the Night in Question". This Motion was supported by this counsel's Affidavit and reference made to an Affidavit of a retired Toledo Police Officer, -12-

stating that the actions and omissions of the 911 operators in question constituted departures from the standard practices, were intentional, without any regard or concern for Mr. Vreeland, and further pointed out that these depositions could be taken shortly, in two weeks time or less, so as not to hold up the actions of Judge Magistrate Morgan, and Judge Gerald E. Rosen. On November 27, 1991, Judge Magistrate Virginia M. Morgan denied Plaintiff's Rule 56(F) Motion for Discovery,a nd also, Magistrate Morgan entered her Report and Recommendation that the Motions for Summary Judgment as to all defendants be granted; and this order then was entered on December 2, 1991, and received by this counsel later. This counsel then timely filed on December 13, 1991, Objections, Memoranda, and Affidavits and Attachments, in Opposition to the Magistrate's Report and Recommendation. Thereafter on January 27, 1992, Plaintiff filed another Motion, supported by Affi- -13-

davit, for Leave to Depose the 911 Operators, and those determining their training, practices and policies.

On January 31, 1992, Judge Gerald E. Rosen, then entered jdugment, with an (Entry Date of February 3, 1992) granting Summary Judgment for all Defendants, and further ordering, that any appeal by Plaintiff would be frivolous and not in good faith.

Then timely, Plaintiff filed a Motion Under Rule 59, and also for Leave For Discovery Under Rule 56(F).

Then, on March 23, 1992, Judge Rosen denied Plaintiff's Motion for a New Trial, Under Rule 59, and denied Plaintiff's Motion for Additional Discovery Under Rule 56(F), and Plaintiff then timely filed his Notice of Appeal to the Court of Appeals For the Sixth Circuit on April 22, 1992.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS HAS DENIED PETITIONER RECOVERY FOR AN ARBITRARY INTRUSION DENIAL, AND LOSS OF HIS EMOTIONAL WELL-BEING BY EITHER THE GROSSLY NEGLIGENT, OR INTENTIONAL, KNOWINGLY WRONGFUL ACTS OF THE 911 OPERATORS, WHEREAS RECOVERY FOR THE SAME HAS BEEN ALLOWED FOR GROSS NEGLIGENCE IN WHITE V. ROCKFORD, 592 F. 2d. 381, 385 (CA 7, 1979); AND ALSO THE SEVENTH CIRCUIT REQUIRED INTENTIONAL WRONGDOING, IN AN EN BANC DECISION, ARCHIE V. CITY OF RACINE, 847 F.2d 1211, (CA 7, 1988).

HERETOFORE, THE SIXTH CIRCUIT HAS ALLOWED 1983 RECOVERIES FOR GROSS NEGLIGENCE VINSON V. CAMPBELL COUNTY COURT, 820 F. 2d. 195, (CA 6, 1987) AND JONES V. SHERRILL, 827 F.2d 1102 (CA 6, 1987).

The present Court of Appeals Opinion misapprehends and overlooked the appalling, uncalled for, acts of the 911 Operators in slandering, denigrating, humiliating knowingly Mr. Vreeland, recognized by the sheriff deputies 911 Operators as being "crazy", when he was obviously so mentally disturbed that he needed to be taken to a Mental

Health Hospital as required by Michigan Statutes Annotated Section 14.800 (427 et se.) as simple negligence whereas the unattacked affidavit of a retired, police officer, experienced in dispatcher duties, unequivocally criticized the 911 operators uncalled for actions as gross negligence, and intentional, and therefore Plaintiff made a Prima Facie Section 1983 case for an invasion of his emotional security.

The tape of the 911 Operators' words has been transcribed, by this counsel's secretary, and appears in the Appendix at Page 58. A copy of the 911 tape has been duly verified by an Affidavit of Attorney Dale Lockwood, who received it from Prosecutor Frey, while representing Mr. Vreeland in the Criminal prosecution of Mr. Vreeland.

In Mr. Vreeland's Affidavit, filed November 8, 1991, he stated in paragraph 1:

> "1. Plaintiff Vreeland states that when Sheriff Deputies Sweat and Berkey ran their Sheriff's car right at him up to two feet near him, that this scared him very much, and that this caused Mark then to step from where -16-

he was standing, to avoid being hit, and scared him because he feared he might be hit, and made him mad and felt then that all of the Sheriff Deputies were his enemies, where as before he had not felt that way as to Deputy Sheriff Bellino. Plaintiff says things were calming down between Deputy Bellino and him, and Mark at those times, did not have the shotgun closed, but rather the shotgun was open breech, broken there. And then it was resting upon his shoulder, but then after Deputies Berkey and Sweat assaulted him, and Mark then says that he ran backwards. But, Mark knows all of what he did was caused by reason of the hostility and the anger that was generated by Deputies Sweat and Berkey running their Sheriff Deputy's car right up to him as though to hit him. This was witnessed by the Michigan State Trooper. Also Operator 6 told me to "go and kill yourself". This caused great anger and anguish, and influenced me to further become hostile in my mind at that time."

In the "Affidavit of Plaintiff Mark E. Vreeland in Support of Objection To Magistrate's Report and Recommendation", filed January 27, 1992, Entry 59, he stated, at paragraph 2:

"2. During the early morning hours of April 23, 1988, I began walking down the road from my residence with a broken-down shotgun over my shoulder. My residence at the time was 266 E. Hurd Rd., and I had just finished

talking with these deputies on and off for well over an hour and a half. I remember that the reasons that I left my home, walking down the road with a shotgun over my shoulder, were because I was persuaded by the Monroe County Sheriff's Departments 911 Dispatch Operators into believing that I was less important than other people, that my life was not worth living and that I should kill myself, and that I was just a "sick bastard," and that "they", the Monroe County Sheriff's Department would "oblige" in killing me."

3. All these things were told to me and more from the 911 Dispatch Operators, and all during a time in which I was truly suffering and needed psychiatric help. For a great while, my life seemed to be falling apart after I returned home to Monroe, Michigan, after having served 2-1/2 years in West Germany, and a total of 3 years in the U.S. Army all together. I could not seem to re-adapt to normal nonmilitary life. Problem after problem arose one after another until it got so bad that I began to lsoe my midn, and was becoming ill, and I was unable to find help. On that date (April 23, 1988) my suffering had become so

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bad that I now no doubt needed psychiatric help. Also, at that time, I was also very heavily intoxicated from having consumed an unusual amount of alcohol. I called 911 because I had never attempted to turn to them for help. I was in some sort of sate of paranoia in my mind as a result of my illness. I recall that paranoia was the reason that I didn't give my address to the dispatchers even though I gave them my name and social security number. Another reason I didn't give my address was because the dispatcher made a sarcastic comment about "mars is a long way out there". Instead of these Deputies attempting to gain my trust they isntead led me to believe that they could not be trusted at all. They instead humiliated me and discriminated against me because they believed that they could get away with it, because I was Just a "crazy" person. Yet! I still continued to call back because they were trying to take something away from me. They were trying to -M-

take away from me my right to call and contact the 911 emergency number and report that I am in need of some sort of help, without having to be subject to unprofessional inhumane harrassment, ridicule, humiliation, and discrimination. These officers did me wrong and they know it!

4. In the state of mental disorder I was in, and as I became more hostile towards the dispatchers due to their hostility towards me, I then left my house armed and possible on my way to confront them and/or my mother. I would never have armed myself, and I would have never even left that house had I not been persuaded by those Deputies into committing some sort of crime of confronting them, and or committing suicide upon myself due to their comments and suggestions.

In this argument, we claim a right to recover for the mental distress caused by the 911 Operators. This Court of Appeals Opinion in this case denied all liability -20-

from the 911 Operators, and this Court's Opinion at page 8 reads:

> "Dispatchers Townsend, Hardaway, Lauwers, and Gruber may have acted negligently and unprofessionally in dealing with Vreeland, but mere negligence is not enough to constitute a §1983 violation. Davidson v. Cannon, 474 U.S. 344 (1986). In Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 282 (6th Cir. 1987), this court stated:
>
> In our view a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow."

We claim that the 911 Operators either knew or must be assumed to have been aware that their actions would cause Mr. Vreeland to suffer mental distress, and that the 911 Operators knew and intended so to cause him.

Retired Toledo Police Officer Early in his Affidavit, filed November 8, 1991 stated, as on the pages of his Affidavit,

At Page 8:
". . . .If you are receiving num- -21-

erous phone calls from somebody who is having problems, whether it's alcohol or drug induced or mental dificiency, on the part of the caller, you just try to, first of all, establish some type of rapport with that person, so that you don't aggrivate or aggitate them. Second of all, you try to get a crew to that location of those people to see if you can get some help for them."

And at Page 10:

". . . .EARLY: As far as Mr. Vreeland, the conversations that I heard, and the attitude that I gleaned from him, that what his conversation was, first of all he was probably either high on drugs or had been taking some alcohol, or both. He eluded to the fact that he was possessed, or felt like he was possessed, and he was going to kill somebody or he will have killed somebody, that he, in fact, had a weapon, and there was a lot of conversation going on between the dispatchers and Mr. Vreeland, that I don't believe should have taken place in the first place. And there was some personalities that were coming out from the dispatcher's office, that I believe possibly could have aggravated or aggitated the situation. I believe that there was a dispatcher, a central dispatcher who gave the identification number of 6, there was a Sergeant Townsend, and there was a Lieutenant who I could not get the name of because of the garbled conversation on the tape, that in fact, probably helped aggitate the person on the other phone, on the other line, who was Mr. Vreeland." -22-

And at Page 12:

"RUST: Now then, which of these practices would you say that any person that's had any training would actually know that they were deliberately or with reckless indifference, departing from and not following the standard practices of what dispatchers are supposed to do as you described them before here in your statements.

EARLY: Well generally, the dispatcher number 6, the Sergeant Townsend, and the Lieutenant were all deviating from the standard oeprating procedure of handling calls by private citizens.

RUST: What would you say as to whether those procedures, or the statements they made were intentional or spoken with gross indifference as to the standard practices.

EARLY: Well, I would say it was done with gross indifference to standard practice, in fact, I would believe that you would say that it was an aggitating demeanor on all of them trying to aggrivate the citizen who was making the calls.

RUST: Then would you say that that would then be an intentional departure from the standard practices?

EARLY: Yes it was. Very intentiom l.

RUST: Well about, as to all of these practices, would you say that anyone who had had any training at all, that that would be an intentional departure from them?

EARLY: Yes. <u>It was very intentional</u>.

RUST: Because it was commonly known among police people, it was it commonly known among police people, from your experience, that whether you are a dispatcher, or not, from the training which you receive as to how to handle people who appear to be mentally de-

ranged, or upset, seriously disturbed, like this man saying that he was possessed, and he was breathing hard into the tape, that that's a matter of common knowledge among law enforcement people? That's a basic tenet that's taught to all law enforcement people when you encounter a person who has apparent mental derangement or something like that, at least momentarily, to handle them supportively, instead of in an accusing or hostile manner.

EARLY: Exactly. The best thing they could have done was hang-up on the man. Irregardless of how many times they call, the best thing they could have done was hang up on him. There was one operator that handled it, I thought, perfectly well, however, I did not get any identification off of him, and what he did actually was, tell the man to have a nice day and hung-up on him. That's the best way to handle it. That way you're not aggrivating him, because of your attitude, you're not personally becoming involved, which you are not supposed to do as a law enforcement officer."

Regardless of whether a law enforcement officer is dialing with a mentally ill or disturbed eprson who ahs escaped, or if the mutually ill person has escaped, or if the mutually ill person has just had an attack, the law enforcement officer is taught and knows that he or she should be supportive, not hostile nor accusative. Reasonable

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minds can so find. A jury question is here presented as whether the Monroe County Sheriff deputies were as aware of causing emotional distress to Mr. Vreeland, as the Sheriff of Dickson County Tennessee, should have known that the inmate Trustee would, if allowed to drive a Sheriff's car, attack and kill a woman in Nishiyam v. Dickson County, Tennessee, 814 F.2d.277 (6th Cir., 1987). Defendant 911 operator knew that they would cause mental distress to Mr. vreeland, and the tape calls for the inference that was what they intended to do. A jury could and should find that the Monroe County Sheriff 911 deputies, and the Sargeant, and the Lieutenant, knew that, and that the Sargeant and the Lieutenant gave their implicit, if not explicit approval. The 911 operators and their superiors simply acted in an inhumane, utterly uncalled for, unacceptable, and outrageous, fashion.

In White v. Rockford, 592 F.2d. 381 (CA7, 1979), the Police Officers left minor

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children out on the Chicago Skyway, exposed to the cold, and helpless to help themselves. One child had claims only an injury to "emotional well-being," and that claim was upheld in White v. Rockford, Supra, at page 385:

> "Admittedly the case for the other defendant who alleges only psychological injury is somewhat closer, but we nonetheless feel that the protections of the Due Process Clause against arbitrary intrusions on personal security includes both physical and emotional well-being."

This conflict on the right to recover for unconstitutional abuse of State's power by grossly negligent or intentional wrongs needs to be reserved by this Honorable Supreme Court.

ARGUMENT NO. II

THE EVIDENCE FROM THE AFFIDAVITS OF MARK E. VREELAND SHOW BETTER THAN THIS COUNSEL CAN SUMMARIZE THAT THE 911 OPERATORS' WORDS OF RIDICULE, DISDAIN, DISRESPECT, MADE MARK FURTHER DEPRESSED, FEEL LIKE HIS LIFE WAS NOT WORTH LIVING AND THAT HE WAS A "NOBODY," AND ACTUALLY CAUSED MARK, IN HIS NEUROTIC CONDITION, TO LEAVE HIS HOME, AND TO WALK OUT, WITH AN UNLOADED SHOTGUN, BREECH OPEN, TO CONFRONT THE SHERIFF DEPUTIES, WHERE THE EXPECTANCY THAT MARK WOULD BE SHOT WAS INEXCAPABLE, BUT EVEN AFTER MARK VREELAND MET DEPUTY BELLINO, HE WAS IN THE PROCESS OF MAKING PEACE WITH DEPUTY BELLINO, WHEN DEPUTIES SWEAT AND BELLINO DROVE THE SHERIFF'S CAR AS THOUGH TO HIT MARK; AND THEN MARK WAS SO ANGERED, THAT HE POINTED HIS UNLOADED SHOTGUN AT THE DEPUTIES, AND IN TIME WAS SHOT.

In the "Affidavit of Plaintiff Mark E. Vreeland in Support of Objection To Magistrate's Report and REcommendation," filed January 27, 1992, he stated, at paragraph 2:

> "2. During the early morning hours of April 23, 1977, I began walking down the road from my residence with a broken down shotgun over my shoulder. My residence at the time was 266 E. Hurd Rd., and I had just finished talking with Monroe County Sheriff's Deputies over the telephone on the 911 emergency extension line. I had been talking with these deputies on and off for well over an hour and a half. I remember that -27-

the reasons that I left my home, walking down the road with a shotgun over my shoulder, were because I was persuaded by the Monroe County Sheriff's Departments 911 Dispatch Operators into believing that I was less important than other people, that my life was not worth living and that I should kill myself, that I was just a "sick bastard," and that "they" the Monroe County Sheriff's Department would "oblige" in killing me."

And paragraph 4 of the same Plaintiff's Affidavit reads:

"4. In the state of mental disorder I was in, and as I became more hostile towards the dispatchers due to their hostility towards me, I then left my house armed and possible on my way to confront them and/or my mother. I would never have armed myself, and I would have never even left that house had I not been persuaded by those Deputies into committing some sort of crime of confronting them, and or committing suicide upon myself due to their comments and suggestions."

Even after Mr. Vreeland had left his home, and met Deputy Bellino, he was getting along all right with Deputy Bellino, and was not angry, and would have put his shotgun down, had not Deppties Sweat and Burkey driven the Sheriff's car as though to hit Mark.

Thus, in paragraph 6 of Plaintiff's said Affidavit, Mr. Vreeland stated:

> "First the Monroe County Sheriff's Department 911 Operators coaxed and persuaded me at a time when my conscious mind was weak, at a time my mind was sick, at a time my mind was malfunctioning. Then after I was led to believe my life was not worth living and they would 'oblige in killing me,' I then got out onto the road with a gun. Then even after I was confronted and Deputy Bellino had secured the scene, they (Deputies Sweat and Burkee) then disturbed, broke up, and upset the scene by attacking me with their patrol car."

Mentally ill and disturbed persons cannot defend themselves like a normal person. Mentally ill persons need the protection and help of the law, more than mentally normal people.

Mr. Vreeland in time was shot, after 2 other Sheriff Deputies drove their Sheriff's car right at him, missing him by inches. Michigan State Trooper Brown called as back-up, saw the Sheriff Deputy drive the car at Mr. Vreeland and stated in his official report, as follows, as given in the Court of Appeals

Appendix at page 104:

> "The subject had a shotgun on his righ...of Busweiser beer in the other hand. The deputy was...to drop his gun and the subject stated, "you better kill...
>
> Approximately three minutes passed when anot...Sheriff's Department Patrol vehicle arrived at the scene...the arriving vehicle appeared to be trying to hit the...holding the shotgun with their patrol vehicle."

Once Monroe County established their 911 "Central Dispatch" system, Monroe County in truth and im fact held out to the persons in Monroe County -- "If you need help, call us, and we'll give you Professional help." That call went to the mentally ill, women abused by husbands, women abused by gentleman friends, and to the disabled, like a diabetic. Mr. Vreeland needed help like a diabetic needs insulin. Monroe County in truth asked for a "special relationship" to all who called in.

In Balistera v. Pacifica Police Department, 855 F.2d 1421, (CA 9, 1988), the Court gave Constitutional 1983 protection to a woman from attack by her estranged husband. In

Balistera, Supra, the Court commented on the so-called "special relationship," as shown at page 1422:

> "'To determine whether a "special relationship" exists, a court may look to a number of factors, which include (1) whether the state created or assumed a custodial relationship toward the plaintiff, (2) whether the state was aware of a siecific risk of harm to the plaintiff; (3) whether the state affirmatively placed the plaintiff in a position of danger; or (4) whether the state affirmatively committed itself to the protection of the plaintiff. See Ketchum, 811 F.2d at 1247; Escamilla, 796 F.2d at 269-70; Jensen v. Conrad, 747 F.2d 185 194 (4th Cir. 1984).'"

In Archie v. City of Racine 826 F.2d 480 the Seventh Circuit's panel opinion was vacated En Banc 847 F.2d 1211 (1988), but the first opinion gives support that a special relationship under 1983 principles may exist without custody or control, when it stated in 826 F.2d 497:

> "(16) A special relationship between the state and a particular person can also arise where there is no actual control or custody by the state. A municipality that puts a person in a position of danger from private persons and subsequently fails to protect that person can be held -31-

liable under §1983 for the resulting deprivation of life or liberty. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)."

Logically, if a 911 agency causes a mentally ill person to become so angry that the mentally ill person cannot exercise his or her limited judgment, and defend him or herself as otherwise the mentally ill person could, such mentally ill person has been seriously harmed. Se here.

The Law at its best responds to reason and holds what is just, and it is basic that just when one deals with a mentally ill person, that that mentally ill person must be expected to do the unexpected.

Here, the 911 Operators simply caused Mr. Vreeland to become more mentally ill and disturbed, and to do what Mr. Vreeland did.

That is a more direct relationship than when a woman calls for help and is not given help, but this counsel submits that then 1983 should cover such cries for help.

When Mark Vreeland first called to 911,

he showed no plan, intention nor any in dication of leaving his home. He knows what went on in his mind, and what caused him to leave where he was, so a Jury and a Judge could infer.

ARGUMENT NO. III

THE FEDERAL COURT SYSTEM NEEDS A DIRECTION FROM THE UNITED STATES SUPREME COURT TO REMAND ALL PENDING PENDENT STATE COURT ACTIONS TO THE STATE COURTS, ONCE THE FEDERAL COURT, APPELLATE OR DISTRICT, DETERMINES TO DISMISS ALL THE FEDERAM ACTIONS.

SUCH IS DIRECTED BY TITLE 28, SECTION 1367, BUT THE FEDERAL COURTS DO NOT SEEM TO WANT TO ABIDE BY THAT STATUTE.

Title 28, Section 1367, Supplemental Jurisdiction is typed in full in the Appendix to this case at page 55.

We respectfully point out sub-section (c), and particularly (3) thereof. Subsection (c) reads:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --
>
> (1) the claim raises a novel or complex issue of State law, -33-

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, thereare other compelling reasons for declining jurisdiction." (Emphasis Ours.)

In our Rule 59 Motion in the District Court's / we asked for our State Causes of Action to be transferred to the State Courts, where in sub-section F of our Motion we stated:

"F. Judge Rosen did not refer to, nor consider, our plea, that as to the State's Causes of Action derived from Michigan law that the Court grant the Relief asked in Paragraph 9 of our Objections filed December 13, 1991, that Judge Rosen remand, or transfer such actions based on the State law of Michigan, to a Michigan Court, with the obligation on Defendants not to assert any Statute of Limitations defense which could not have been asserted on the filing of this case on April 30, 1991, in the Federal Court; as this lawsuit presents new and complex issues of Michigan law best handled by a Michigan Court, all of which is well supported by Financial General Bankshares Inc. v. Metzger, 680 F.2d 768 (CA DC, 1982); Pharo v. Smith, 625 F.2d 1226 (CA 5, 1980);

G. Plaintiff moves this Court also under Rule 59 to vacate its Judgment As to All the State Actions on Michigan Law, and to dismiss without prejudice, or under such Conditions that Plaintiff may refile -34-

within 30 days under Federal Title 28, Section 1367(d),..."

Argument No. 7 in the Court of Appeals asked for that Court to order dismissal of the state actions under Title 28, Section 1367, and so as to leave the parties as to the Statute of Limitations, where they were when this action was started. See Pharo v. Smith, 625 F.2d 1226 (CA5, 1980); Financial General Bankshares, Inc. v. Metzger, 680 F.2d 768 (CA D.C., 1982)

Questions on Michigan Law as to each of these Actions for slander, libel, intentional tort, assault, and malicious prosecution are yet undetermined, as Defendants have not cited so-called "cow cases" -- cases that stand on all fours with the controversies at Bar. Prosecutor Frey and Michigan Trooper Murphy are claimed to have upheld and conditioned Plea Bargaining for a while because Plaintiff would not give up his right to sue. Both Defendants Frey and Murphy knew that the evidence of Mr. Vreeland's mental illness was

was so strong that he should not be prosecuted.

ARGUMENT NO. IV

THE STATE ACTIONS FOR SLANDER, LIBEL, INTENTIONAL TORT, ASSAULT, AND BATTARY, WERE AND ARE VALID ACTIONS, AND NOT BARRED BY GOVERNMENTAL IMMUNITY, FI THE ACTOR WAS CHARGEABLE WITH GROSS NEGLIGENCE.

The various insulting, ridiculing, humiliating, remarks by the 911 Operators including calling Mr. Vreeland "crazy," a "nut," a "chimpanzee," a man who preferred to sleep with men, and in general a person with whom others should not associate. Such is actionable slander under Michigan Law. Callaghan's Michigan Civil Jurisprudence; Hall v. Citizens Insurance Co., 368 N.W. 2d 250 (1985).

Likewise, any offer to do harm, as Deputies Sweat and Burkey did in almost hitting Mr. Vreeland with the Sheriff's car, is actionable. Callaghan's Michigan Practice, Assault and Battery 528.

So also Mr. Vreeland's right to an action for intentional infliction of emotional -36-

distress. Campos v. Oldsmobile Division, GMC, 71 Mich. App. 23, 246 N.W. 2d, 353, 354.

Our overall Court system is best managed when State Courts are not defining Federal rights, and Federal Courts are not defining State rights.

ARGUMENT NO. V

THIS COURT SHOULD GIVE DIRECTION TO THE FEDERAL AND STATE COURTS THAT TRIAL COURTS WHEN FACED WITH A RULE 56(F) MOTION FOR LEAVE FURTHER DISCOVERY, FILED AFTER A DISCOVERY CUTOFF, AND AFTER A MOTION FOR SUMMARY JUDGMENT, SHOULD GRANT THE SAME IF COUNSEL CAN SHOW ANY PRACTICAL POSSIBILITY OF SECURING EVIDENCE THAT WOULD DEFEAT THE MOTION FOR SUMMARY JUDGMENT.

ANY MISTAKES, OR DELAYS BY THE RULE 56(F) MOVING ATTORNEY SHOULD BE HANDLED BY APPROPRIATE MONETARY FEES ON THE ATTORNEY, WHERE NEITHER THE MOVING PARTY NOR COUNSEL ARE CHARGEABLE WITH EVASION OF DISCOVERY, NOR OTHER CULPABLE ACTS DIRECTED TOWARD SUPRESSING RELEVANT EVIDENCES.

In support of the vlaidity of our 1983 Actions, our claims for slander, and intentional tort, and the need for this Honorable Supreme Court to give directions on Rule 56(F) Motions, we cite a Letter, of December 23,1991 from Charlene D. Palmer, Training & Staff Development, Ohio Department of Mental Health,

which was attached to some filing in the District Court, and which in parts reads:

> "As you already know, I teach the Mental Health section of the Ohio State HIghway Patrol cadet program. Within this section are interventions for law enforcement personnel when dealing with persons who are aggressive and out of control (regardless if they are mentally ill.)."
>
> "There are three essential characteristics to violent behavior that are studied.
> 1. Violence produces more violence. If an angry person is responded to in anger or violently, the anger/violence will escalate.
> 2. Violence is a defensive reaction. The person is attempting to maintain a form of control,... the only way they may feel they know how to accomplish that is to intimidate those around them.
> 3. Violence is time limited, if you can delay long enough, it will subside. Of course, appropriate verbal responses are necessary, or the situation will escalate."
>
> "In the first phase of the crisis cycle: anxiety, the person is responded to with supportive interventions. For example if a person is yelling about something, it would be appropriate to tell the person that you can see that they are angry and that this thing is bothering them and you'd like to talk about it. If this person's anger has excalated to the defensive phase of the cycle, you might respons with the supportive 'I can see you're angry' but with the added directive -33-

intervention: 'but you need to step over here so we can talk' or 'you need to get away from that chair so we can sort this out." Any taunting or snide remarks or challenges will be taken as 'permission' to escalate and you can bet that the person will escalate."

Even where there has been a substantial delay, further Discovery will be allowed where material, and denied when it appears that Discovery will not produce any material evidence. See Fisher v. Metropolitan Life Insurance Co., 895 F.2d 1073 (CA5, 1990).

Here, this counsel simply was not aware of all the fine points, nor the requirements for a valid 1983 Action, and the need for Discovery thereon. This counsel, now 77, a single practitioner, fights tough cases, and, despite efforts to the contrary, gets behind in his work. Not too many lawyers in the cities know of the nuances, defenses, and pitfalls of 1983 Actions. One Detroit Attorney had taken Mr. Vreeland's case, but kept putting him off, and finally about a month before the Statute of Limitations was to run, returned Mr. Vreeland's file, and he 39

came to this counsel. In this Action, no Motion attacking the Complaint was filed. Not until the Motion for Summary Judgment was filed did this counsel become aware of the main points of defense. That may no be excusable, but it happened, and this counsel says a situation like this happens many, many, times. The issue then arises: Is the client to be forced to suffer, because his attorney did not know, and act out, all the precautions? Should a party have as a matter of course, or of right, a period of 30 days to work Discovery on needed points?

How many General Practitioners knew the Complexities of 1983 Nuances, and procedural Technicalities? Very few. How many Judges, before they becane Judges, really knew Section 1983?

The Rules of Federal Practice are supported to avoid "ambush" -- but that is what happened.

Retired Police Officer Early's Affidavit show what we were after. It was basic and valid, and no one has challenged it. -40-

Any sanctions should be against this counsel in the way of any additional fees caused Defendants.

In Conley v. Gibson, 355 U.S. 41, 2L. ed. 2d. 80 (1957) in 2 L. ed. 2d. at page 86, Mr. Justice Block stated:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 US 197, 82 L.ed 745, 58 S. Ct. 507."

Our point here is, when closely scrutinized, valid, because the highest goals of America are truly served when each side is allowed full Discovery on material points, and cases are determined on the nerits, and not of a Misstep of Counsel."

CONCLUSION

This Counsel has acted with respect for the Courts, and while he may have been delayed at times, there has been no artful attempts to take any unfair advantage. -41

Clients who are represented by other attorneys no more skilled nor familiar with the intricacies of various areas of the law not commonly encountered, will be better protected, by granting the reliefs herein moved.

America at its best wants to see every side fairly represented, and cases determined on their merits, not on procedural technicalities.

Our Courts can be a leader toward the observance of the higher American values. Respect for the mentally ill, as well as for those not so afflicted, should be a goal for our Courts.

This Counsel respects this Honorable Supreme Court, and stands committed to do his part in maintaining the Court's highest standards.

We respectfully ask that our Petition for a Writ of Certiorari be granted.

Respectfully submitted,

John G. Rust

-42- John G. Rust
Attorney for Petitioner.

93-352

Supreme Court, U.S.
FILED
JUL 16 1993

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARK E. VREELAND,

Petitioner,

vs.

JAMES TOWNSEND, et al.,

Respondents.

APPENDIX ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

John G. Rust, Esq.
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Toledo, Ohio 43612
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Attorney for Petitioner.

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John G. Rust, Counsel for Petitioner hereby certifies that he, on July 13, 1993, served three (3) copies of the foregoing Appendix on Attorney Marcia L. Howe (Lead Counsel), Michael E. Rosati, Esq., Cummings, McClorey, 33900 Schoolcraft, Ste. G-1, Livonia, MI 48150-1392, Attorneys for All Defendants Except State Trooper Murphy, Brian D. Devlin, Esq., Michigan Department of Attorney General Tort Defense Division, P.O. Box 30217, Lansing, MI 48909, Attorney for Defendant State Trooper Murphy.

Respectfully submitted,

John G. Rust
Attorney for Petitioner

NO. 92-1534
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK E. VREELAND,	:Filed: Apr. 14, 1993
Plaintiff-Appellant,	:ON APPEAL FROM THE UNITED STATES
v.	:DISTRICT COURT FOR THE EASTERN
JAMES TOWNSEND: LYNN HARDAWAY; DONALD HORVATH: PAT LAUWERS; JAMES GRUBER; RICHARD SWEAT; VINCENT BURKEY; DANIEL BELLINO; MICHAEL MURPHY; WILLIAM FREY; MONROE COUNTY CENTRAL DISPATCH; AND MONROE COUNTY PROSECUTOR'S OFFICE,	:DISTRICT OF MICHIGAN : :NOT RECOMMENDED FOR FULL-TEXT PUBLICATION :Sixth Circuit Rule 24 limits citation :to specific situations. :Please see Rule 24 before citing in a
Defendants-Appellees,	:proceedings in a court in the Sixth
WALTER TROBRIDGE, et al.,	:Circuit.
Defendants.	If cited, a copy :must be served on other parties and :the Court. This notice is to be :prominently displayed if this :decision is reproduced.

APP. 1

BEFORE: MERRITT, Chief Judge; and BOGGS and BATCHELDER, Circuit Judges.

PER CURIAM. Mark Vreeland sued the defendants[1] under 42 U.S.C. §1983, alleging that his constitutional rights were violated when he was insulted by Monroe County dispatchers, shot and arrested by Monroe County deputies, prosecuted by the Monroe County Prosecutor, and jailed when all the defendants allegedly should have known that vreeland suffered from an unspecified "mental illness." Vreeland also brought several state law claims based on the same conduct. The district court granted the defendants' motions for summary judgment for failure to state a claim and dismissed all claims with prejudice. Vreeland now appeals that dismissal. We affirm.

1 Defendant Townsend, Hardaway, Lauwers, Horvath, and Gruber are "911" operators for the Monroe County Dispatch. Defendants Bellino, Sweat, and Burkey are Monroe County Sheriff's Deputies. Defendant Frey is the Monroe County Prosecuting Attorney. Vreeland also named the Monroe County Dispatch and the Monroe County Prosecutor's Office as defendants. However, these offices are not separate entities amenable to suit, pursuant to Rule 21, Fed. R. Civ. P. Vreeland did not name Monroe County as a Defendant.

I

On April 23, 1988, Vreeland, after drinking heavily, made a series of phone calls from his residence in Monroe, Michigan to the Monroe County Dispatch on the "911" emergency line. Vreeland made approximately twenty calls between 1:30 a.m. and 1:53 a.m. and continued to call the dispatch until 3:00 a.m. At first, Vreeland told the dispatchers that he was possessed and that he was a werewolf. He identified himself by name and revealed his social security number, but refused to reveal where he lived. In other calls, Vreeland growled into the phone, breathed heavily, simulated missile sounds, commented on Israel's military capabilities, expressed concern about the safety of his mother, threatened to kill his mother, himself, or one of the dispatchers, expressed doubts about his own mental health, informed the dispatchers that "crack and aids is winning," traded insults with the dispatchers, muttered incomprehensibly, or simply abru-

ptly hung up the phone. Over time, the dispatchers became frustrated. They insulted Vreeland, used profanity, and made disparaging remarks about his sexual orientation and cowardice.

One dispatcher asked Deputy Bellino to check out plaintiff's residence and investigate the possibility of taking him into custody. At 3:10 a.m., Bill Younglove, who lived with Vreeland, called 911 to request that a car be dispatched to his residence. Younglove reported that Vreeland had just left the residence, was possibly armed, and that he feared Vreeland might kill his own mother.

At 3:15 a.m., Deputy Bellino, while crusing in his patrol car near Vreeland's residence, spotted a man with a shotgun in one hand and a beer in the other. After the man pointed the shotgun at Bellino and yelled, "I'm evil and I'm going to kill you," Bellino correctly surmised that the man was Vreeland. Bellino turned off his lights,

backed away, and called for backup. Vreeland continued to approach Bellino, still brandishing the shotgun and repeated over and over, "I am evil and I'm going to kill you." Bellino warned Vreeland ten to fifteen times and even tried calling him by name and reasoning with him, but Vreeland continued to threaten him.

Deputies Richard Sweat and Vincent Burkey arrived in a patrol car, pulling up close to Vreeland. The deputies took cover behind their patrol cars and attempted to persuade Vreeland to put his gun down. Vreeland replied that they would have to shoot him and continued to walk closer to Bellino. Several times Vreeland motioned as if he were firing the shotgun. Bellino reported that he fired a warning shot, but Vreeland kept coming forward and taunting the deputies. When Vreeland was about twenty feet away, Bellino shot him in the arm. Vreeland dropped the gun and fell to the ground. Vreeland was taken to the hospital

in an ambulance.

On April 26, 1988, Monroe County Prosecuting Attorney Fred authorized issuance of a warrant for Vreeland's arrest on three felony counts. Vreeland eventually entered a plea of no contest to a misdemeanor charge of attempted assault, pursuant to a plea bargain.

In his complaint, Vreeland characterizes his barrage of phone calls to the dispatch as a plea for help by someone suffering from an unspecified mental illness. Vreeland alleges that the four dispatchers -- Townsend, Hardaway, Lauwers, and Gruber -- defamed and ridiculed him, and exacerbated his confusion and distress, thus destroying his self-esteem and prompting him to take self-destructive, even suicidal, actions such as taunting and threatening the deputies. He also claims that their insults amounted to libel, slander, and intentional infliction of emotional distress. Vreeland alleges that Horvath, the dispatchers' supervisor, is

responsible for the dispatchers' unprofessional conduct.

Vreeland alleges that Deputies Sweat and Burkey encouraged his self-destrictive behavior and committed assault and battery by almost hitting him with their patrol car. Vreeland alleges that deputy Bellino used excessive force by shooting him. Finally, Vreeland alleges that Prosecuting Attorney Frey maliciously prosecuted him on the felony charge of assault with a dangerous weapon.

The defendants moved for summary judgment, claiming that Vreeland has failed to state a claim against Monroe County because he has failed to identify a policy, custom, or practice upon which the individuals acted and he failed to establish that the dispatchers were inadequately trained; that Prosecuting Attorrey Frey is entitled to absolute immunity; that Vreeland has failed to state a constitutional claim against the individual dispatchers because he has not

established a special relationship between them and Vreeland; and that the deputies are entitled to qualified immunity.

The district court granted the motions and dismissed both the federal and state claims with prejudice.[2] The district court also determined that any appeal from its decision would be frivolous and not in good faith and thus ruled that, pursuant to 28 U.S.C. §1915(a), an appeal could not be taken in forma pauperis. Undeterred, Vreeland's counsel pressed forward and now challenges the dismissal of all federal and state claims and the denial of a motion to conduct further discovery.

II

We review de novo the district court's grant of the defendants' motions for summary judgment. Baggs v. Eagle-Picher Industries, Inc., 957 F.2d 268, 271 (6th Cir. 1992). We

[2]Vreeland was a resident of Ohio at the time of his arrest; therefore, the district court had diversity jurisdiction over the state claims.

can affirm the district court only if we determine that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party need not support its motion with evidence disproving the non-moving party's claim, but need only "show[] -- that is, point[] out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The pivotal question before us is whether Vreeland, the party bearing the burden of proof, has presented a jury question as to each element of his case. Id. at 322. Vreeland must present more than a mere scintilla of evidence in support of his position; he "must present evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

III

A

To prevail in a §1983 action, a plaintiff must show that the conduct complained of was committed by a person acting under the color of state law and that the conduct deprived the plaintiff of rights, privileges, or immunities guaranteed by the Constitution or federal statutes. 42 U.S.C. §1983; see Parratt v. Taylor, 451 U.S. 527 (1981). The defendants concede that they were acting under the color of state law, but contend that their conduct did not deprive Vreeland of any constitutional or federal statutory rights. On a more fundamental level, Vreeland's §1983 claim is deficient because he failed to identify with specificity the constitutional right that was allegedly violated. In Wells v. Brown, 891 F.2d 591 (6th Cir. 1989), this court held that plaintiffs seeking damages under §1983 must set forth clearly in their pleadings the capacity in which they are suing the defendants. Vreeland's pleading is

seriously deficient. No actions of specific defendants are tied to specific constitutional or statutory rights. In fact, no particular constitutional provision or statute is even mentioned at all. As Vreeland's counsel candidly admits, "Plaintiff was represented by the only attorney that he could get, an attorney unfamiliar with the complexities of Section 1981 actions." Appellant's Brief, at v (emphasis added). Although we could affirm the district court's dismissal of the federal claims on this ground alone, we briefly address Vreeland's §1983 claims against each defendant.

B

Prosecutor Frey is unqnestionably entitled to absolute immunity because he was sued for conduct within the scope of his prosecutorial duies, prosecuting Vreeland for assault with a dangerous weapon. Imbler v. Pachtman, 424 U.S. 409, 420 (1976).

C

Dispatchers Townsend, Hardaway, Lauwers,

and Gruber may have acted negligently and unprofessionally in dealing with Vreeland, but mere negligence is not enough to constitute a §1983 violation. Davidson v. Cannon, 474 U.S. 344 (1986). In Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 282 (6th Cir. 1987), this court stated:

> In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

The only clear risk that was made known to the dispatchers was the threat that Vreeland might kill his mother. Although the dispatchers insulted Vreeland and engaged in needless bickering, they also ascertained Vreeland's address and his mother's address and acted to prevent the risk by notifying Deputy Bellino.

Finally, this is not a case where the state actors owed an affirmative duty of care to the plaintiff. Such cases only arise when

"the affirmative exercise of [the state's] power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, e.g., food, clothing, shelter, medical care, and reasonable safety..." Reeves by Jones v. Besonen. 754 F. Supp. 1135, 1140 (E.D. Mich. 1991) (citing Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989). Vreeland voluntarily called and harassed the dispatchers, and he chose to confront the deputies with shotgun in hand.

D

Vreeland claims that the deputies used excessive force in effectuating his arrest. In Graham v. Connor, 490 U.S. 386, 388 (1989), the Supreme Court held that escessive force claims are to be analyzed under the "objective reasonableness" standard of the Fourth Amendment rather than under a substantive due process standard. The deputies claim an affirmative defense of qualified

immunity. Under the doctrine of qualified immunity, government officials performing discretionary duties "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, a defendant has qualified immunity unless the plaintiff's "rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have understood that he was under an affirmative duty to have refrained from such conduct." Dominique v. Telb, 831 F.2d 673, 676 (6th Cir. 1987).

Vreeland was drunk, brandishing a shotgun claiming that he was so evil that he had to be eradicated, and threatening and taunting the deputies. Before Deputy Bellino shot Vreeland, he gave him ten to fifteen verbal warnings, attempted to reason with him, fired a warning shot, and waited until Vreeland was

approximately twenty feet away, still approaching, and still making threats. The deputies are clearly entitled to qualified immunity.

Vreeland's claim that Sergeant Townsend inadequately trained Deputy Bellino fails for the same reasons that his claim of inadequate training of the dispatchers fails, as discussed in the following section.

E

Vreeland did not name Monroe County as a defendant, but the claims against the Monroe County Dispatch and the Monroe County Prosecutor's Office -- neither of which is amenable to suit -- are best interpreted as claims against Monroe County. Even under this liberal interpretation of the pleading, Vreeland has failed to establish a §1983 claim against Monroe County.

First, Monroe County cannot be subjected to liability unless the allegedly unconstitutional act is linked to a policy, custom or practice. Monell v. Department of Social

Services, 436 U.S. 658, 690 (1978). Vreeland simply has not cited any policy, ordinance, or regulation. Vreeland has merely alleged that Horvath, the dispatch supervisor, is responsible for the actions of the dispatchers whom he supervises. However, liability under §1983 cannot be established on the basis of respondeat superior. Rizzo v. Goode, 423 U.S. 362 (1976). Vreeland must show:

> ...that the supervisor encouraged the specific incident of misconduct or in some other way directly participated it it. At a minimum, a §1983 plaintiff must show that a supervisory official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir.), cert. denied, 469 U.S. 845 (1984).

The dispatchers may have acted unprofessionally by stooping to Vreeland's level and trading insults. However, there is no evidence that the dispatchers were following a policy, custom, or practice of Monroe County. Vreeland's only evidence is that more than one dispatcher engaged in the

questionable exchanges with him. This evidence, standing alone, does not constitute a pattern.

Vreeland's only specific allegation, other than a "respondeat superior" theory, is that Monroe County inadequately trained the dispatchers. Inadequate training may serve as the basis for §1983 liability only when the failure to train amounts to deliberate indifference to the rights of persons with whom the municipality's employees come in contact. City of Canton v. Harris, 489 U.S. 378, 388 (1989). Vreeland's only evidence of inadequate trainging is an affidavit from a retired Toledo police officer with experience as a "911" dispatcher, in which the officer stated that the defendant dispatchers' conduct was inconsistent with standard operating procedure. However, this does not reveal anything about the training program. It only shows that the dispatchers may have performed as if they were inadequately trained in this specific incident. The officer did

not even hypothesize that inadequate training was the moving force causing the alleged deprivation of Vreeland's rights. See id. at 391 (plaintiff must prove that the deficiency in training actually caused the ultimate injury). To the contrary, the retired officer stated more than once in his deposition that he thought that the dispatchers intentionally departed from standard operating procedure.

IV

Vreeland also brought state law claims: assault and battery against the deputies, and intentional infliction of emotional distress, libel, and slander against the dispatchers. The district court properly dismissed these state law claims with prejudice. First, Vreeland claims that by driving their patrol car very close to him Deputies Sweat and Burkey committed assault and battery. Battery requires unlawful touching, Espinoza v. Thomas, 472 N.W.2d 16, 21 (Mich. App. 1991), and Vreeland has not alleged any contact by

by these defendants. Second, the deputies claim they are immune from the assault claim pursuant to M.C.L.A. §791.1407. Vreeland never responded to the defendants' claims of immunity on this point, and there is no evidence in the record that raises a genuine issue of fact material to this claim. Third, the dispatchers' conduct may have been inappropriate and unprofessional, but it does not rise to the level of intentional infliction of emotional distress. See Tope v. Howe 445 N.W. 2d 452, 460 (Mich. App. 1989) ("Liability does not extend to mere insults, indignities, threats, annoyances, petty offenses and other trivialities."). Finally, Vreeland's allegations of libel and slander are frivolous. Vreeland has not specified which statements are untrue; nor has he explained how the dispatchers caused the statements to be published by the local media.

V

Finally, we hold that the district court did not abuse its discretion by denying

Vreeland's motion to conduct further discovery under Rule 56(f) of the Federal Rules of Civil Procedure. See York v. Tennessee Crushed Stone Association, 684 F.2d 360, 363 (6th Cir. 1982). We agree with the district court's summation: "To request an extension of time to take depositions now when he could have taken them during the past year and a half offends the discovery process."

VI

For the foregoing reasons, we AFFIRM the district court's dismissal of Vreeland's federal and state claims with prejudice.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-1534

FILED
MAY 27, 1993
LEONARD GREEN, CLERK

MARK E. VREELAND,
Plaintiff-Appellant,

v.

JAMES TOWNSEND, ET AL.,
Defendants-Appellees.

O R D E R

BEFORE: MERRITT, Chief Judge; BOGGS and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

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decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK E. VREELAND,

Plaintiff, No. 90-CV-71130-DT

vs. Hon. Gerald E. Rosen

JAMES TOWNSEND, et al.,

Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFF'S RULE 59 MOTION FOR NEW TRIAL AND/OR TO AMEND OR VACATE JUDGMENT, AND FOR DISCOVERY UNDER RULE 56(f)

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on MAR 23 1992

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter is before the Court on Plaintiff/s February 12, 1992 "Motion Under Rule 59 for New Trial and/or to Amend or Vacate Judgment; for Leave for Discovery Under Rule 56(f); and for Other Relief."

Plaintiff's Motion arises out of this Court's January 31, 1992 Order and Judgment in which the Court adopted Magistrate Judge Virginia M. Morgan's two November 27, 1992

Reports and Recommendations, granted the Defendants' Motions for Summary Judgment, and, accordingly, dismissed Plaintiff's case in its entirety with prejudice.

The basis of Plaintiff's Motion is his contention that the Court's January 31, 1992 Order and Judgment are deficient because they do not reference that the Court considered the tape of Plaintiff's telephone call to "911" on the night in question and further does not reference Plaintiff's November 4, 1991 Motion for Discovery pursuant to Fed. R. Civ. Pro. 56(f).

With respect to the foregoing contentions, the Court would note that it did, in fact, review the certified transcript of the 911 tape, as well as Plaintiff's Rule 56(f) Discovery Motion and the Magistrate Judge's November 27, 1991 Order denying same. These items are part of the Court's file of this action, and the Court specifically stated in the January 31, 1992 Order that the Court had "reviewed both of the Magistrate Judge's

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Reports and Recommendations, Plaintiff's Objections thereto, and the Court's file of this action. . . ."

To the extent that Plaintiff assigns as error the Court's failure to specifically address in its January 31, 1992 Order Plaintiff's objections to the Magistrate Judge's Order denying his Rule 56(f) Discovery Motion, the Court has once again reviewed that Order and finds no error in the Magistrate Judge's ruling. As Magistrate Judge Morgan quite clearly stated at pp. 2-3 of her Order, Plaintiff -- who now is, and ever since the inception of this lawsuit in May 1990 has been, represented by an attorney -- has had more than ample time to conduct discovery during the year and a half pendency of this action. It was not until nearly two months after Defendants filed their motions for summary judgment -- and nearly three months after the discovery cut-off in this case -- that Plaintiff filed his Rule 56(f) discovery motion. As the Magistrate Judge stated at

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page 3 of her Order denying the discovery motion: "To request an extention of time to take depositions now when he could have taken them during the past year and a half offends the discovery process." This Court wholeheartedly agrees.[1]

The grounds for the granting of motions to alter or amend a Judgment[2] are set forth in Eastern District of Michigan Local Rule 7.1(h) (3):

> (m) Motions to Alter or Amend a Judgment or for Rehearing or Reconsideration.

---

[1] On January 27, 1992, Plaintiff submitted a new Rule 56 (f) discovery motion seeking the same discovery that he sought in his November 1991 motion which the Magistrate Judge denied. For the reasons stated above in this Opinion and Order and for the reasons stated by the Magistrate Judge in her November 27, 1991 Order denying Plaintiff's previous Rule 56(f) motion, Plaintiff's new Rule 56(f) motion will be denied.

[2] Although Plaintiff has alternatively captioned his Motion as one for New Trial under Fed. R. Civ. Pro. 59(a), since no trial was ever conducted in this matter, Rule 59(a) is inapplicable. Thus, the Court will treat Plaintiff's Motion as one to "alter or amend a Judgment" under Rule 59(e).

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(3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been mislead but also show that a different disposition of the case must result from a correction thereof.

The Court finds that Plaintiff has merely presented the same issues already ruled upon by the Court, either expressly or by reasonable implication, in its January 31, 1992 Order and Judgment. Further, Plaintiff has not demonstrated a palpable defect by which the Court has been misled or that a different disposition of the case must result from a correction thereof.

For these reasons,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's February 12, 1992 Motion under Rule 59 be, and hereby is, DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's January 27, 1992 Rule 56(f) discovery motion is also DENIED.

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Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK E. VREELAND,

Plaintiff,

No. 91-CV-71130-DT

Hon. Gerald E. Rosen

vs.

JAMES TOWNSEND, LYNN HARDAWAY, DONALD HORVATH, PAT LAUWERS, JAMES GRUBER, RICHARD SWEAT, VINCENT BURKEY, DANIEL BELLINO, MONROE COUNTY CENTRAL DISPATCH, MICHIGAN STATE POLICE OFFICER MICHAEL MURPHY, WILLIAM FREY, AND THE MONROE COUNTY PROSECUTOR"S OFFICE,

Defendants.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S TWO NOVEMBER 27, 1991 REPORTS AND RECOMMENDATIONS AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on JAN 31 1992

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter having come before the Court on two Reports and Recommendations ("R & Rs") submitted by United States Magistrate Judge Virginia M. Morgan on November 27, 1991 recommending in the first of these November 27, 1991 R & Rs, that the

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Court grant Defendant Murphy's Motion for Summary Judgment, and recommending in the second R & R that the Court grant the Motion for Summary Judgment filed by Defendants Townsend, Hardaway, Horvath, Lauwers, Gruber, Sweat, Burkey, Bellino, Monroe County Dispatch, Director of Central Dispatch. William Frey and the Monroe County Prosecutor's Office; and Plaintiff having timely filed objections to the Magistrate Judge's Reports and Recommendations; and the Court having reviewed both of the Magistrate Judge's Reports and Recommendations, Plaintiff's Objections thereto, and the Court's file of this action and having concluded that, for the reasons stated in the Report and Recommendations summary judgment should be entered in favor of the all of the remaining Defendants in this action and this case should, accordingly by dismissed in its entirety; and the Court being otherwise fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Magistrate Judge's two Reports and

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Recommendations of November 27, 1991 be, and hereby are, adopted by this Court.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate Judge's two November 27, 1991 Reports and Recommendations, (1) Defendant Murphy's Motion for Summary Judgment be, and hereby is, GRANTED, and (2) the Motion for Summary Judgment of the remaining defendants, --i.e., that of Defendants Townsend, Hardaway, Horvath, Lauwers, Gruber, Sweat, Burkey, Bellino, Monroe County Dispatch, Director of Central Dispatch, William Frey and the Monroe County Prosecutor's Office -- be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint is DISMISSED in its entirety with prejudice.

28 U.S.C. § 1915 CERTIFICATION

The Court further hereby sets forth its certification under 28 U.S.C. § 1915 that, in the event that Plaintiff seeks to appeal from this case, Plaintiff should not be permitted

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to proceed with such appeal in forma pauperis for the following reasons.

Under 28 U.S.C. § 1915(a), "an appeal may not be taken in forma pauperis if the [district] court certifies in writing that it is not taken in good faith." The Supreme Court has further defined a "frivolous" action as one that "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 1831 (1989).

For the reasons stated in the Magistrate Judge's Report and Recommendation which this Court has concurred in and adopted this date, Plaintiff's §1983 civil rights claims are factuallya nd legally deficient. This Court, therefore, makes the finding that Plaintiff's claims are frivolous because they lack an arguable basis in law or fact. Accordingly, this Court determines that any appeal from this decision would be frivolous. It is clear, then, that an appeal could not be taken in good faith and, therefore, pursuant to 28 U.S.C. §1915(a), may

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not be taken *in forma pauperis*.

/s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK E. VREELAND,

Plaintiff,

vs.

JAMES TOWNSEND, LYNN HARDAWAY, DONALD HORVATH, PAT LAUWERS, JAMES BRUBER, RICHARD SWEAT, VINCENT BURKEY, DANIEL BELLINO, MONROE COUNTY CENTRAL DISPATCH, MICHIGAN STATE POLICE OFFICER MICHAEL MURPHY, WILLIAM FREY, AND THE MONROE COUNTY PROSECUTOR'S OFFICE,

Defendants.
_____/

No. 91-CV-71130-DT
Hon. Gerald E. Rosen

JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on _____

PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Order (1) adopting the Magistrate Judge's two November 27, 1991 Reports and Recommendations and (2) granting (a) the Motion for Summary Jdugment filed by defendant Murphy (b) the Motion for Summary Judgment filed by the remaining defendants -- Defendants Townsend, Hardaway, Horvath,

Lauwers, Gruber, Sweat, Burkey, Bellino Monroe County Dispatch, Director of Central Dispatch, William Frey and the Monroe County Prosecutor's Office;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment be, and hereby is, entered in favor of the DEfendants and Plaintiff's Complaint, accordingly, is DISMISSED with prejudice.

/s/Gerald E. Rosen
Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK E. VREELAND,
Plaintiff,

v.

JAMES TOWNSEND, LYNN HARDAWAY, DONALD HORVATH, PAT LAUWERS, JAMES GRUBER, RICHARD SWEAT, VINCENT BURKEY, DANIEL BELLINO, MONROE COUNTY CENTRAL DISPATCH, MICHIGAN STATE POLICE OFFICER MICHAEL MURPHY, WILLIAM FREY, and THE MONROE COUNTY PROSECUTOR'S OFFICE,
Defendants.
_____/

CIVIL ACTION NO. 90 CV 1130 DT
JUDGE GERALD E. ROSEN
MAGISTRATE JUDGE VIRGINIA MORGAN

ORDER DENYING PLAINTIFF'S MOTION PURSUANT TO RULE 56(F)

This matter is before the court on the plaintiff's motion pursuant Fed.R.Civ.P. Rule 56(f) for additional time to take depositions in order to oppose defendants' motions for summary judgment. Defendants have not responded. Plaintiff, Mark Vreeland, through his attorney filed this complaint pursuant to 28 U.S.C. §1331 and presumably under 42 U.S.C. §1983 on May 2, 1990, alleging that defendants violated his constitutional rights. After consideration of all the issues raised; APP. 35

IT IS ORDERED that the motion be and here by is DENIED for the following reasons.

Fed.R.Civ. P Rule 56 (f) states with respect to opposition to a motion for summary jdugment pursuant to Fed.R.Civ.P. Rule 56:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This rule will not be applied to aid a party who has been lazy or dilatory. "Thus, a request for relief under Rule 56(f) is extremely unlikely to succeed when the party seeking the delay has failed to take advantage of discovery." Wright, Miller & Kane, Federal Practice and Procedure Civil 2d, §§2740-7241 (West Supp. 1991).

Here, plaintiff seeks to take the depositions of defendant Hardaway, Lauwers, Gruber, Sergeant Townsend, and the lieu-

tenant involved, and other unidentified persons in the Sheriff's office responsible for the type of training given to dispatchers. Plaintiff claims that he been unable to obtain this information due to a "cloak of silence" or a "conspiracy of silence."

However, plaintiff does not state what steps eh has taken to depose these individuals or to obtain the necessary information. HE has known the identity of defendants since he filed the lawsuit in May, 1990. Plaintiff and defendants were given an ample discovery period and plaintiff did not request an extension. Defendants filed their motions for summary judgment in September and October, 1991. Plaintiff has not demonstrated why he was unable to obtain this information before now. He states that he had reason to believe that defendants' conduct departed from standard practices after he listened to the tape and based upon the affidavit of George Early, a re-

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tired Toledo Police Officer. (John Rust Affidavit at p. 1) As such, he should have taken steps to inquire into the training of Monroe County dispatchers then and not now. To request an extension of time to take depositions now when he could have taken them during the past year and a half offends the discovery process.

Therefore, for the reason discussed above, plaintiff's motion is denied.

SO ORDERED.

/s/ Virginia M. Morgan
VIRGINIA M. MORGAN
UNITED STATES MAGISTRATE JUDGE

Dated: NOV 27 1991

PURSUANT TO TULE 77(D), FED.R. CIV.P. COPIES MAILED TO ATTORNEYS FOR ALL PARTIES ON November 27, 1991.

Lori Coons
DEPUTY COURT CLERK

TO: /s/ John Rust
/s/ Michael Rosati
/s/ Lawrence Vanwassenova
/s/ Brian Devlin

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Filed: APR 23 1990

Mark E. Vreeland,

Plaintiff,

Case No. 90CV71130DT

v.

PLAINTIFF'S COMPLAINT AND JURY DEMAND ENDORSED HEREON

James Townsend,

Lynn Hardaway,

Donald Horvath,

Lauwer (first name unknown)

James Gruber,

Richard Sweat,

Vincent Burkey,

Daniel Balino,

Walter Trobridge,

Monroe County Sheriff,

Monroe County Central Dispatch,

9-1-1 Agency or Organization,

Carl VanWerdt,

Henrik Kanavel,

Michael Murphy,

William Frey,

Office of the County Prosecutor,

Defendants.

John G. Rust (0000098)
4628 Lewis Avenue
Toledo, Ohio 43612
(419) 476-0347

APP.

1. Jurisdiction of this Court is invoked under Title 28 US CS 1330 for diversity of citizens, and under Paragraph 1331, as Plaintiff claims this action involves his rights arising under the Constitution and Laws of the United States of America. Plaintiff is a citizen and Laws of The United States of America. Plaintiff is a citizen and resident of Ohio, and each of the Defendants are citizens and residents of Michigan.

2. On April the 23rd, 1988, Plaintiff Mark E. Vreeland resided at 266 Hurd Road, Monroe, MOnroe County, Michigan. At that time, he suffered a spell of temporary loss of control and of his senses, due to conditions in his mind, a part of which had arisen during his service in The United States Armed services, where unfortunately, he had started the use of drugs and alcohol. In the early hours of April the 23rd, 1988, Plaintiff was at his residence, had been drinking beer for several hours, was intoxi-

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cated, and was, mentally in loss of control, and telephoned for help to the 9-1-1-Organization or Agency in Monroe County Michigan, as shown by his numerous statements, which were so known and recognized, or in the exercise of ordinary care, should have been so recognized, by the operators, of the 9-1-1 Agency, and the Monroe Coutny Central Dispatch each of which are governmental organizations. Defendant Lynn Hardaway, (first name unknown) Lauwer,,James Gruber, and Sargeant James Townsend, were employees of the Monroe County Central Dispatch, and either talked to, or heard the conversations with Plaintiff at that time. Plaintiff stated, that among other things, he was "possessed," felt a "force" from outer space, and made other comments, showing that he was in dire need of help. Defendant Hardaway and others of the named Defendants, then in talking with him, defamed him, held him up to ridicule, and caused him to be further troubled and in loss of control, by their remarks, actions and

BEST AVAILABLE COPY

tone of voice. Defendants James Townsend, as the Sargeant in charge, Lynn Hardaway, (first name unknown) Lauwer, herein after referred to as Lauwer, and James Gruber, either spoke, or ratified, or failed to correct in any way, the danger causing and improper wrods, "a bastard; you look like a chimpanzee," and other defamatory and hostility generating, ridiculing, statements, which in Plaintiff's weakened condition, all proximately caused him mentally, and otherwise to be unable to defend himself as otherwise he would have. Each person, mentioned above, and the Monroe County Central Dispatch persons did not act professionally, were not supportative, and failed to follow the standard of accepted practices of those in their position in that they did not use terms and tone of voice that was supportative, helpful, but instead made Plaintiff's situation worse, by threatening and hostile actions toward him, to the Monroe County Deputies who heard the statements

on the same telephone line of communication, to take steps to arrest and to incite and invite and entrap Plaintiff to commit an act, for which the deputies might arrest him.

3. Plaintiff would have remained in his home, but was provoked, incited, entrapped, by the statements made over the 9-1-1 line, by the people mentioned above, to leave his home; and walked up Monroe Street in Frenchtown Township, Monroe County, Michigan. In doing so, he carried a can of beer in his left hand, and over his shoulder, a shot-gun, with the breech open, in a non-firing position and continued so to do. About 3:15 A.M., on April the 23rd, 1988, he then was seen by a Depty Sheriff Daniel Belino, who passed him, in the night time, in an unlighted area, and then reversed his Sheriff's car, from the intersection of Hurd and Monroe Street. Through the Monroe Central Dispatch nine, communications went out then, to all the Sheriff's deputies, be on the lookout for

Vincent Berkey, in a Sheriff's car, came upon Plaintiff, then committed an act of assault upon Plaintiff by driving the Sheriff Deputies car, as though it were going to hit the Plaintiff and this put Plaintiff in fear, and further caused a loss of ability for him to control himself and further contributed directly to his temporary loss of control so that he was not in a condition then, to be culpable or blamed for his act, because of his mental condition. Defendant Bellino then, without sufficient cause or provocation, and through negligence, and intentional wrong, fired a shot-gun shot at Plaintiff, striking Plaintiff in the right elbow, causing various fractures of the bones of his arm, and him to be permananently disabled, and to suffer much pain and suffering.

4. Defendants Townsend, also Donald Horvath, the Supervisor of the Monroe Central Dispatch, Hardaway, Lauwer, and Gruber, by their acts and omissions and/or in the

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alternative, intentionally, proximately caused Plaintiff to be in the position where he was so shot by Defendant Bellino. Defendant Donald Horvath, then Sheriff Walter Trobridge, Carl Van Werdt, then Commander or in charge of the Erie Post of the Michigan State Police, and Police Chief, Henrik Kanavel, were also liable and responsible for all the aforesaid in that Defendants Trobridge, VanWerdt, and Knavel, were in the Board of Directors or in Control of the said 9-1-1 Organization, and the Monroe County Central Dispatch, that they failed to see to it that the operators on the 9-1-1 Line, in the Monroe Central Dispatch, were trained professionally, and directed as to know what to do, when receiving a call on the 9-1-1 as Plaintiff had sent in as stated above; and had they not been negligent, they would, by following the approved standards of care, if they so trained, the said operators, that they would have mitigated, mollified, attempted to help, in a supportive and

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professional manner, rather than acting unlawfully as stated above. Further, then Sheriff Trobridge, and each of the Sheriff Deputies, and Supervisors thereof, were negligent, in not having instructed the Sheriff deputies as to how to have handled the situation, without such excessive force and permanent injury to Plaintiff and were guilty of negligence or in the alternative, intentional wrongs, by not using methods that would have been protective of said deputies and the Plaintiff, that were either known, or should have been known, in proper law enforcement actions for the people involved here.

5. Defendant Michael Murphy, a Sergeant, Michigan State Police, Flatrock Post, Prosecuting Attorney William Frey, and others of the above named Defendants, then prosecuted, and continued to prosecute Plaintiff on felony charges, assault with a dangerous weapon, contrary to Michigan Compiled Law, 750-82

claiming that Plaintiff had pointed a shotgun at Deputy Bellino; and the same as to Deputy Sweat and that Plaintiff did carry and have in his possession a shotgun, contrary to Michigan Compled Law 750-82, four counts of felonies altogether, and did for some eleven months, or more, cause Plaintiff so to be prosecuted in the District Court for the County of Monroe, First Judicial District, and Plaintiff to be confined in jail all of the time. Defendants and each of them, well knew, from the tapes and electronic recordings of the conversations of Plaintiff and from Plaintiff's actions, that he was not mentally in control of himself, so was temporarily deranged, that he was not criminally culpable nor to be blamed for his actions, nor responsible for the same, and likewise, from other sources, but Defendants either recommended or directly contributed to the further prosecution of the Plaintiff, or were liable for not having taken a proper stand against such prosecution,

and have each then proximately caused him to suffer from a prosecution which never should have been conducted, or continued.

6. Defendants Haraway, Townsend, Lauwer, Gruber, Horbath, Trobridge, and VanWerdt, and Kanavel, were each liable for the aforesaid libels and slanders, were published then, and have been published since, and are recorded and will be published in the future without cause or privilege and have been so published continuing in on to this year; and by reason thereof, Plaintiff is entitled to compensatory and punitive damages in the amount of $50,000.

7. Defendants Bellino, Townsend, Sweat, Burkey, Trobridge, were liable for the use of excessive force by Defendant Bellino in shooting and permanently injuring and damaging Plaintiff or for their intentional wrongs or by the negligence of the Sheriff Trobridge and the Sergeant Townsend, in not having effectively trained Deputy Bellino for situations such as were here encountered.

8. Plaintiff states that there were various procedures that would have enabled Deputy Bellino safely, and without permanent injury to Plaintiff, to be taken into effective custody, but that the Defendants named in this paragraph were negligent in not having trained Deputy Bellino how effectively adn safely to all concerned, to have taken Plaintiff into custody; or else, Defendant Bellino acted intentionally; and by reason of each and all or in the alternative Plaintiff is entitled to compensatory and punitive damages, for the assault and battery upon him, in the amount of $100,000, from each of the Defendants named in this Paragraph.

9. Further, Defendants caused to be published in the Monroe Evening News, an account of the events of April the 23rd, 1988, in form and words, with the implication, highly critical and defamatory of the Plaintiff, which were untrue, in acts of commission or in omission, and this has been published in the permanent files of the said paper, or

on in to 1990; and Defendants either authorized or ratified or failed to point out any corrections, of the said accounts, although Defendants knew of the errors and defamatory and false statements in the said account.

10. Defendant Prosecuting Attorney William Frey, and Michigan State Trooper Michael Murphy, denied Constitutional Rights of the Plaintiff when, within one hour after he had been operated, at the hospital in Ann Arbor, each questioned him, about what had transpired and happened.

11. Defendants Frey, Murphy, and the other defendants herein, prosecuted, and continued to prosecute, without cause, but from malice, Plaintiff, so that he was kept in jail, until on or about March the 17th, 1989, although each knew, and should have known, had each exercised ordinary care, that Plaintiff was not guilty of the four counts with which he was charged of Felonies. Defendant Frey, during the course of his being held in jail, offered to dismiss some

or all of the charges if Plaintiff would sign a civil release in favor of the Defendants herein, or portions of them. In so doing, Defendant Frey and Defendant Murphy violated the proper standards of those in their position and proximately caused the Plaintiff to have to stay in jail much longer than called for properly, by the law and proper law enforcement. Further, Defendant Frey and Defendant Murphy, worked to cause a-cover-up of exactly what had happened by each person involved, causing discredit upon the Plaintiff, and probably unjustifiably, unjustly, ypon some of the others involved, leading to Plaintiff's arrest. Defendant Frey and Defendant Murphy approximately caused a delay in the release of Plaintiff without cause or legal justification thereby denied Plaintiff's basic rights, guaranteed by the Law, and the Constitutions of the United States of American, and of Michigan.

12. Plaintiff in March, 1989, and

before was under great mental stress and other mental problems, and Defendant Frey, knwoing that Plaintiff would be acquitted and found not guilty, and that Plaintiff was under duress and direly wanted to be released, just before the scheduled Trial, offered to release Plaintiff if Plaintiff would plead No Contest to a misdemeanor; and also Defendant Frey, and those Defendants participating in that offer, then and for a long time prior thereto, knew that Plaintiff was not guilty, and Plaintiff under great duress did so plead, and was released, but did not agree to Defendant Frey's requests to release Defendants, and Plaintiff so pleaded on the ground that he could and would sue Defendants.

13. Wherefore, Plaintiff Mark E. Vreeland prays that he may have and recover judgment against each and all of the Defendants, for $50,000, as to each, or more, as herein before stated, and for the recovery of his court costs and attorney fees herein; and prays for judgment against Defendants

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Townsend, Hardaway, Horvath, Lauwer, Gruber, Sweat, Burkey, Bellino, Trobridge, also Monroe County Sheriff, Monroe County Central Dispatch, 9-1-1 Agency or Organization, Carl VanWerdt, Kanevel, Murphy, Frey and Office of the County Prosecutor.

Plaintiff Mark E. Vreeland by:

(s) John G. Rust
John G. Rust, His Attorney
833 Security Building
Toledo, Ohio 43604
(419) 243-9191

JURY DEMAND ENDORSED HEREON

Plaintiff demands trial by jury of all the issues herein.

Mark E. Vreeland, by:

(s) John G. Rust
John G. Rust

APP. 52A

MICHIGAN STATUTES ANNOTATED,
SECTION 14.800. - SHERIFF'S DUTY TO
TAKE A MENTALLY ILL PERSON TO HOSPITAL

"§14.800(427) Pleas officer observing personal conduct; custody and transportation to hospital or notification of community mental health emergency service unit; procedure; application for hospitalization.) Sec. 427. (1) If a peace officer observes an individual conducting himself (or herself) in a amnner which causes the peace officer to reasonably believe that the individual is a person requiring treatment as defined in section 401, the peace officer may take the individual into protective custody and transport (the individual) to a hospital for examination pursuant to section 429 (or may notify the community mental health emergency service unit for the purpose of requesting mental health intervention services. If notified, the community mental health emergency service unit shall provide those mental health intervention services which it considers appropriate unless the individual declines the services. If the individual declines the services, the peace officer shall immediately transport the individual to a hospital. These services may be provided at a site mutually agreed upon by the peace officer and the community mental health emergency service or at the site of the community mental health emergency service unit. In the course of providing services, the community mental health emergency service unit may provide advice and consultation to the peace officer which may include a recommendation to transport the individual to a hospital for examination pursuant to section 429, or to release the individual from rpotective custody. However, the peace officer is not constrained from exercising his or her reasonable judgment. If a peace officer determines that an indivi-

dual shall be released from protective custody as a result of consultation with a community mental health emergency service unit, the community mental health emergency service unit shall assure provision of follow-up counseling and diagnostic and referral services as needed, unless the individual declines the services.) UPon arrival at the hospital, the peace officer shall execute an application for hospitalization of the individual.

Immunity from financial responsibility.) ((2) A peace officer shall not befinancially responsible for the cost of care of an individual for whom a peace officer has executed an application under subsection (1).)

Notification of results of hospital examination to community mental health service unit.) ((3) A hospital receiving an individual pursuant to subsection (10 who has been seen by a community mental health emergency service unit shall notify that unit of the results of an examination of that individual conducted by the hospital.) (MCL §330.1427)

History. AS amended by Pub Acts 1978, No. 598, imd eff January 4,1979."

TITLE 28, SECTION 1367
SUPPLEMENTAL JURISDICTION

§1367. Supplemental jurisdiction
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case of controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over

claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after

it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. (Added Dec. 1, 1990, P.L. 101-650, Title III, §310(a), 104 Stat. 5113.)

APP. 57

911 PHONE CALL OF MARK VREELAND

OPERATOR: CENTRAL DISPATCH, OPERATOR 24.

VREELAND: HELLO, OPERATOR?

MO: THIS IS THE POLICE DEPARTMENT. CAN I HELP YOU?

V: WHO AM I SPEAKING TO?

MO: OPERATOR 24.

V: DO YOU KNOW WHO I AM?

MO: NO.

V: I'D LIKE TO MAKE A REPORTING.

MO: OK.

V: MY NAME IS MARK EDWARD VREELAND.

MO: WHAT'S THE PROBLEM?

V: SIR, I BELIEVE I'M POSSESSED.

MO: OK. DO YOU WANT TO HOLD ON?

S: YES, CAN I HELP YOU? SERGEANT TOWNSEND.

V. YES SIR. I'M NOT GOING TO BE ON THE LINE VERY LONG.

S: U CAN'T UNDERSTAND YOU.

V: I'M A LITTLE NERVOUS.

S: WHAT ARE YOU NERVOUS ABOUT SIR?

V: WHAT?

S: WHAT ARE YOU NERVOUSE ABOUT?

APP. 58

APP. 58

V: I'M JUST GOING TO LET YOU KNOW, I...

S: PARDON ME?

V: I FEEL A FORCE COMING IN.

S: OH, YOU DO?

V: IT'S COMING IN FROM, FROM, UH...

S: UFO?

V: NO, FAR AWAY

S: HOW FAR AWAY?

V: FAR AWAY.

S: JUPITER, MARS, UH, VENUS?

V: FAR AWAY.

S: FURTHER THAN THAT?

V: YES.

S: MARS IS WAY OUT THERE.

V: MY NAME IS MARK EDWARD VREELAND. MY SOCIAL SECURITY NUMBER IS 381-72-7986.

S: UH-HUH.

V: I FEEL SOMETHING THAT IT'S UNUSUAL.

S: SPELL YOUR LAST NAME.

V: V-R-E-E-L-A-N-D

S: OK. WELL WHAT DO YOU MEAN? WHAT DO YOU FEEL, MARK? (HEAVY BREATHING) HELLO?

V: I'M STILL HERE.

S: PARDON ME?

APP. 59

V: I'M STILL HERE.

S: WHAT KIND OF SENSATION ARE YOU GETTING?

V: I'M PERFECTLY SOBER RIGHT NOW, OFFICER.

S: I BELIEVE YOU. HOW OLD ARE YOU?

V: I AM 23 YEARS OLD.

S: WHAT;S YOUR DATE OF BIRTH?

V: 2/17/1964.

S: 2/17/64?

V: YES, THAT'S CORRECT.

S: WHERE WERE BORN AT,MARK?

V: WYANDOTT, MICHIGAN.

S: OK, WHERE DO YOU LIVE?

V: MONROE, MICHIGAN.

S: WHERE ABOUT?

V: MONROE, MICHIGAN.

S: YEAH, I KNOW YOU LIVE IN MONROE. WHERE / AT?

V: I DON'T KNOW.

S: DO YOU GOT ANY IDEA? DO YOU LIVE IN AN APARTMENT COMPLEX?

V: I'M SORRY. I WON'T TELL YOU. I WILL TELL YOU THIS, THAT THERE'S SOMETHING THERE... THERE'S SOMETHING ELSE OUT THERE.

S: LIKE WHAT?

V: I DON'T KNOW.

S: WHAT ARE YOU WATCHING ON T.V.? (HEAVY

BREATHING)...MARK?...(HEAVY BREATHING)... MARK, WHAT ARE YOU WATCHING ON TV?

V: YOU KNOW WHAT I'M WATCHING ON T.V.

S: NO MARK, WHAT? ARE YOU A WEREWOLD?

V. I'M WATCHING THE...UNAUDIBLE.

S: YOU WHAT?

V: (GROWLING, HEAVY BRETHING)

S: UNAUDIBLE...YOU'RE FLIPPING OUT RIGHT?

V: THE EGYPTIANS.

S: WHAT ARE YOU GROWLING FOR?

V: I'M SORRY.

S: YEAH.

V: PELASE RECORD WHAT I AM SAYING.

S: EATING EGYPTIANS?

V: I'M GONNA, I'M GONNA LET IT GO, OK?

S: THE PHAROAHS?

V: NO, I KNOW THIS, I KNOW YOU ARE RECORDING EVERYTHING I TELL YOU. PLEASE RECORD EVERYTHING. (HEAVY BREATHING)

S: UNAUDIBLE.

****

V: (HEAVY BREATHING) IF YOU'RE WONDERING, I"M IN VIET NAM. UNAUDIBLE.

****

WOMAN OPERATOR: CENTRAL DISPATCH..(HEAVY BREATHING)...OK, IF THIS IS THE CRAZY GUY THAT JUST CALLED US SAYING YOU'RE

POSSESSED, DON'T CALL US BACK ANYMORE. THERE IS NOTHING WE CAN DO TO HELP YOU.

****

WO: CENTRAL DISPATCH.

V: YOU WILL RECORD.

WO: WE ARE RECORDING IT.

V: RECORD.

WO: OK, WHAT DO YOU WANT US TO DO?

V: I'M GONNA LET IT GO.

WO: SO, LET IT GO.

V: RECORD.

WO: GO RIGHT AHEAD.

****

WO: CENTRAL DISPATCH.

V: YES, I WANT TO REVEAL MYSELF.

WO: YOU'RE GOING TO REVEAL YOURSELF.

V: YES.

WO: TO WHOM? IS THIS THE GUY THAT'S JUST BEEN CALLING HERE?

V: MY NAME IS MARK EDWARD VREELAND.

WO: OK.

V: SOCIAL SECURITY NUMBER 381-72-7986.

WO: OK. WHAT' YOUR DATE OF BIRTH?

V: JUNE 17TH, 1964.

WO: OK. DO WE HAVE A WARRANT FOR YOU OR SOMETHING?

APP. 62

APP. 62

V: NO. PLEASE MAM, THIS IS AN EMERGENCY.

WO: OK. WHAT'S THE EMERGENCY? YOU'RE THE ONE CALLING HERE BREATHING ON THE PHONE?

V: PLEASE.

WO: WHAT DO YOU WANT?

V: THIS IS NOT ME. PLEASE.

WO: OH, THIS IS THE WEREWOLF THAT'S INSIDE YOU THAT'S BREATHING ON THE PHONE.

V: NO. THERE AIN'T NO SUCH THING.

WO: OK. WELL YOU'RE THE ONE WHO'S CALLING HERE TALKING ALL THIS OFF THE WALL STUFF. THIS BETTER BE AN EMERGENCY.

V: PLEASE LISTEN.

WO: OK. I'M LISTENING...GO AHEAD.

V: (HEAVY BREATHING)

WO: IF YOU ARE NOT GOING TO SAY ANYTHING, I AM GOING TO HANG UP. OK. BECAUSE I DON'T HAVE TIME. IF YOU WANT TO TALK, I'LL LISTEN, BUT I DON'T HAVE TIME TO LISTEN TO YOU BREATHE ON THE PHONE. SO YOU DECIDE.

V: WHO AM I SPEAKING TO?

WO: PARDON?

V: WHO AM I SPEAKING TO?

WO: OPERATOR 6.

V: WHO IS THIS?

WO: OPERATOR 6.

V: WHO IS OPERATOR 6?

APR 63

WO: THAT'S ALL YOU NEED TO KNOW.

V: 666....(LAUGHTER)

WO; SIR, CAN I HELP YOU?

V: 666....

****

WO: MR. VREELAND, STOP CALLING HERE. OK. STOP CALLING HERE.

V: (GROWLING)

****

V: I'M GOING TO KILL MY MOTHER.

WO: WHERE ARE YOU CALLING FROM?

V: I'M GOING TO KILL MY MOTHER.

WO: YOU KNOW WHAT? YOU'RE SICK. YOU ARE SICK AND DISGUSTING.

V: I KNOW I AM.

WO: YOU ARE SICK BASTARD. STOP CALLING HERE.

****

LOTS OF BACKGROUND NOISE

LONG TONE

WO: IS THIS THE GUY THAT IS GOING TO KILL HIS MOTHER?

V: YES.

WO: IF WE FIND OUT WHERE YOU ARE, YOU'RE GOING TO JAIL. CONTINUOUS LONG TONE AND HEAVY BREATHING. UNAUDIBLE WORDS.

****

MALE OPERATOR: CENTRAL DISPATCH

V: WHAT ARE YOU WATCHING ON T.V.?

MO: HEY, I DON'T KNOW. WHAT ARE YOU WATCHING?

V: I DON'T KNOW. WHAT ARE YOU WATCHING?

MO: WHO IS THIS?

V: WHO IS THIS.

MO: WHO IS THIS?

V: I DON"T KNOW.

****

WO: MR. VREELAND? IF YOU DON'T TELL US WHERE YOU ARE, DON'T EVEN BOTHER CALLING BACK DOWN HERE. SHERIFF'S DEPARTMENT.

V: WHAT?

WO: WHY DON'T YOU KILL YOURSELF? THEN WE WON'T HAVE TO WORRY ABOUT YOU ANYMORE.

****

WO: CENTRAL DISPATCH. YES. YES.

****

OPERATOR CALLED INFORMATION

I: RECORDS DEPARTMENT.

WO: ARE YOU BUSY?

I: NO. WHAT DO YOU NEED?

WO: OK. DO ME A FAVOR. SEE IF YOU CAN FIND A CURRENT ADDRESS ON A GUY NAMED MARK EDWARD VREELAND. V-R-E-E-L-A-N-D. 6/17/64.

I: OK.

WO: THANKS BYE.

****

S: SERGEANT TOWNSEND...HELLO?'''HELLO?

APR 65

V: UNAUDIBLE.

S: PARDON?

S: I'M LISTENING.

S: LISTENING TO WHAT?

V: LISTENING TO YOU.

****

WO: CENTRAL DISPATCH.

I: UNAUDIBLE.

WO: YES.

I: VREELAND?

WO: YES.

I: 266 HURD.

WO: 266 EAST HURD ROAD.

I: IT DOESN'T SAY.

WO: IT'S PROBABLY EAST.

I: I FIGURED THAT IT WAS BY WINCHESTER.

WO: OK. DID HE HAVE, UH, WHEN WAS THIS ADDRESS ON EAST HURD ROAD MOST CURRENT?

I: HE SAID IT WAS 4/16, BUT..UNAUDIBLE.

WO: OF THIS MONTH.

I: YES.

WO: FOR WHAT

I: UNAUDIBLE..WHILE INTOXICATED.

WO: OK. THIS FOOL IS CALLING ON THE PHONE

DRIVING US NUTS. OK. UH. HOW BIG IS HE?

I: UH...ABOUT 155 POUNDS, 5'10".

WO: OH AND ALSO, YOU KNOW WHEN YOU GAVE ME THAT INFORMATION ON LARRY SMITH AND JODI RAMSEY? WHATEVER..UM..I'VE BEEN IN ...UNAUDIBLE..WITH THOSE.

I: UMMM.

WO: OH DID THEY? GREAT. THANKS. BYE.

****

V: HELLO.

WO: I KNOW WHERE YOU LIVE AND I'M GOING TO SEND A CAR THERE TO ARREST YOU.

V: WHERE DO I STAY AT?

WO: I'M NOT GOING TO TELL YOU BECAUSE THEN YOU'LL LEAVE. NOW, I KNOW WHERE YOU LIVE AND I KNOW YOU"VE JUST BEEN ING ARRESTED A COUPLE OF DAYS AGO FOR CREAT-/ A DISTURBANCE WHILE YOU WERE DRUNK, LIKE YOU'RE DOING RIGHT NOW.

V: SO WHAT.

WO: SO WHAT, NOTHING. YOU GOING TO JAIL YOU ASSHOLE.

V: SUCK MY DICK.

WO: NO, YOU SUCK IT YOURSELF, YOU PRICK.

****

WO: CENTRAL DISPATCH...

V: FUCK YOU.

****

WO: CENTRAL DISPATCH.

V: I SAID... YOU'D WATCH ME BURN IN HELL FOR 365...

WO: HEY, YOU KNOW WHAT? YOU JUST KEEP ENJOYING THE SOUNDM BUDDY, BECAUSE YOU'RE GOING TO BE IN JAIL BEFORE 3:00.

****

S: SERGEANT TOWNSEND HERE.

V: I'M GOING TO BURN IN HELL FOR 365 DAYS.

S: I KNOW YOU WILL. AND YOU'LL BE IN JAIL FOR 365 DAYS. (VREELAND TALKING IN BACKGROUND, UNAUDIBLE) YOU ARE GOING TO BE IN JAIL FOR 365 DAYS, DON'T WORRY ABOUT IT. BUT...UNAUDIBLE.

V: LONGER THAN THAT.

S: THEN DON'T WORRY ABOUT IT.

****

LONG TONE.

WO: HEY, YOU BETTER BRING A TOOTHBRUSH BECAUSE YOU ARE GOING TO JAIL.

V: UNAUDIBLE.

****

CONTINUOUS LONG TONE.

TALKING IN BACKGROUND.

V: FUCK YOU. DO YOU WANT ME OR WHAT?

MO: HEY ARE YOUA SPACE CADE BY CHANCE?

V: SUCK MY DICK.

MO: HEY, YOU DON'T HAVE ONE BUDDY. IF YOU HAD A DICK, YOU'D BE DOWN HERE TO TALK TO ME.

APP. 69

V: FUCK YOU.

MO: YOU'RE A PUSSY.

V: WHY DON'T YOU FICKIN' COME AND GET

LAUGHTER IN BACKGROUND.

****

V: (HEAVY BREATHING & STRANGE NOISES) DO YOU BELIEVE IN GOD, DON'T YOU? DO YOU WORSHIP HIM?

MO: ARE YOU REALLY A NUT?

V: I'VE GOT YOU...

MO: I'VE MET A LOT OF NUTS, BUT YOU'RE THE FIRST ONE THAT BELIEVES IN GOD.

V: OH. UNAUDIBLE...BELIEVE IN GOD?

MO: YEAH, MOST OF THEM ARE ATHEISTS.

V: OH. YOU BELIEVE IN GOD.

MO: YEAH.

V: HEY.

MO: DO YOU BELIEVE IN THE ORIGINATION IF DARWIN'S THEORY, UH, EVOLUTION OF LOOK CHIMPANZEES INTO MAN? VREELAND, YOU/ LIKE A CHIMPANZEE.

V: I TELL YOU WHAT...

****

WO: CENTRAL DISPATCH.

P: HELLO.

WO: HI. I NEED YOU TO DO ME A FAVOR.

P: WHAT KIND OF FAVOR?

WO: WE GOTY SOME FOOL FUCKIN'BASTARD ON THE

PHONE WHO HAS BEEN DRIVING US CRAZY.

P: OH YEAH?

WO: I NEED YOU TO GO OUT TO THE HOUSE AND SEE IF YOU CAN TALK HIM INTO SLUGGING YA, SO YOU CAN BRING HIM INTO JAIL.

P: OH YEAH?

WO: HE LIVES AT 266 E. HURD ROAD.

P: OK.

WO: HIS NAME IS MARK EDWARD VREELAND.

P: HEY, I THINK I KNOW HIM.

WO: HE JUST GOT ARRESTED 3 OR 4 DAYS AGO FOR CREATING A DISTURBANCE IN THE CITY.

P: MARK WHAT?

WO: MARK EDWARD VRELAND. 6/17 of 64. 266 E. HURD ROAD IS WHERE BILL YOUNGBLOOD LIVES/ IF YOU KNOW HIM.

P: YEAH, I KNOW BILL.

WO: OK. BECAUSE I KNOW THIS GUY IS CRAZY TOO. HE'S TALKING ABOUT KILLING HIS MOTHER AND ROTTING IN HELL AND SUCK MY DICK AND YOU'RE A PUSSY AND DAT, DAT, DAT, DAT AND ALL THIS STUFF. HE'S DRIVING US NUTS.

P: VREELAND?

WO: YES.

P: HOW DO YOU SPELL THE LAST NAME?

WO: V-E, OH EXCUSE ME. V-R-E-E-L-A-N-D.

P: SO WHAT'S THE COMPLAINT?

WO: HE'S DRIVING US CRAZY. (LAUGHTER)

P: HE JUST KEEPS CALLING THEN?

WO: YEAH, CAN'T YOU, UM, UM, IF YOU KNOW, I'LL BE THE COMPLAINTIFF FOR HARASSING PHONE CALLS OR SOMETHING. TOWNEY SAYS HE THINKS YOU CAN DO THAT.

P: OH YEAH. IT'S BE UH, UNAUDIBLE, OR SOMETHING LIKE THAT.

WO: YEAH, MISUSE OF A COMMUNICATION DEVICE.

P: YEA.

WO: THAT'S WHAT IT IS.

P: IT'S A MISDEMEANOR.

WO: HE'S DRIVING US NUTS. I'VE GOT HIM TRACKED ON THE PHONE RIGHT NOW, SO IF YOU LOOK THROUGH THE WINDOWS AND YOU SEE HIM ON THE PHONE, THEN YOU KNOW YOU GOT THE RIGHT HOUSE CAUSE IT'S HIM.

P: OH.

WO: I SAID I KNOW WHERE YOU LIVE AND I SAID YOU BETTER BRING A TOOTHBRUSH AND SOME SOAP ON A ROPE BECAUSE YOU'RE GOING TO BE IN JAIL BEFORE 3:00.

P: DID YOU?

WO: YEAH. (LAUGHTER)...SO HOPEFULLY...

P: SO HOW MANY TIMES HAS HE CALLED YOU?

WO: OH, PROBABLY ABOUT 20 TIMES WITHIN THE PAST HALF OF AN HOUR. WE GOT HIM TRAPPED, UH, LET ME SEE IF HE'S STILL ON THE PHONE...HE'S GONE NOW. HE HUNG UP, BUT HE'LL BE CALLING BACK IN A MINUTE.

P: HMMM. OK. WE'LL GO OUT THERE AND SEE WHAT WE CAN DO.

WO: OK. THANK YOU.

APP. 72

APP. 72

P: BYE.

WO: BYE.

****

WO: CENTRAL DISPATCH. OPERATOR 6.

V: I THINK ISRAEL IS MANIPULATING WARHEADS. DON'T YOU?

WO: I THINK SO TOO.

V: YOU'RE GONNE BE MINE PRETTY SOON.

WO: YEAH, IT'S JUST A MATTER OF TIME BEFORE YOU'RE GOING TO BE MINE BUDDY.

V: MATTER OF TIME. YOU'RE RIGHT.

WO: YEAH, IT'S A MATTER OF TIME FOR YOU AND YOU BETTER BRING SOME SOAP ON A ROPE WITH A TOOTHBRUSH, BECAUSE YOU'RE GOING TO JAIL.

V: I'LL BURN IN YOUR HELL AS LONG AS I CAN.

WO: HEY THAT'S ALL RIGHT. I'LL PROBABLY SEE YOU DOWN THERE. YOU NEVER KNOW.

V: IT'S AN ILLUSION. WHEN IT'S ALL... UNAUDIBLE...YOU WILL BELONG TO MY WORLD. I'M..UNAUDIBLE..FOR YOU.

****

MO: UNAUDIBLE.

V: ISRAEL'S MANIPULATING WARHEADS.

MO: HEY, WHY DON'T YOU BITE MY ASS AND GET OFF THE PHONE.

APR 73

V: AND YOU CAN'T DO NOTHING ABOUT IT.

MO: YOU ARE A SICK SUCKER, BUDDY. YOU KNOW WE HAVE POLICE WORK TO DO. HEY..YOU JUST LAY THERE. HEY, YOU CAN JUST SIT THERE AND DRINK YOUR JUICE OR SMOKE YOUR POT OR SNIFF YOUR CRACK, BUT WE CAN'T DO THAT, OK?

V: IN HELL FROM THE DEVILS. (MISSLE NOISES) ISRAEL (MISSLE NOISES).

MO: ILITOLA KUMANY IS GOING TO GET YOU, TOO, BUDDY.

****

WO: CENTRLA DISPATCH.

V: YES, SO ARE YOU GOING TO HELP MY MOTHER?

WO: ARE YOU GOING TO HELP YOURSELF? YOU'RE THE ONE THAT NEEDS HELP.

V: I'M ASKING YOU A QUESTION. ARE YOU GOING TO HELP MY MOTHER?

WO: YEAH, WHERE IS YOUR MOM?

V: IN THE TRAILER COURT.

WO: SHE LIVES IN THE TRAILER PARK? WHAT'S THE ADDRESS WHERE SHE IS?

V: 775 E. OUTER DRIVE.

WO: 775? IS THAT WHAT YOU SAID? MR. VREELAND?

V: YOU KNOW WHERE SHE'S AT.

WO: NO, I DON'T KNOW WHERE SHE IS. WHERE ARE YOU CALLING FROM? APP.74

V: ARE YOU GOING TO HELP HER?

WO: YEAH, WHAT DO YOU WANT ME TO DO?

V: PROTECT HER FROM..UNAUDIBLE.

WO: WE'RE GOING TO HAVE TO PROTECT HER FROM, UM, UNAUDIBLE..FROM YOU.

V: I DON'T KNOW. YOU GUYS ARE GOING TO HAVE TO PROTECT HER FROM EVIL.

WO: NO. YOU'RE THE ONE THAT SOUNDS LIKE YOU'RE EVIL.

V: NO. I'M NOT EVIL. I BELIEVE IN GOD, DON'T I?

WO: I DON'T KNOW WHAT YOU BELIEVE IN.

V: I DON'T KNOW WHAT TO DO.

WO: PARDON?

V: ARE YOU GOING TO PROTECT HER FROM EVIL?

WO: YES, WE WILL.

V: HOW?

WO: I'LL SEND A PATROL CAR OVER THERE WITH A CROSS AND SOME GARLIC AND THEY'LL KEEP THE EVIL AWAY FROM HER.

V: I WANT TO FUCK YOU IN THE MIDDLE OF THE ROAD.

WO: YOU DO?

V: YEAH.

APP. 75

WO: YOU SOUND LIKE YOU LIKE TO SLEEP WITH OTHER MEN. BUT IT DOESN'T MAKE ANY DIFFERENCE, YOU'RE GOING TO GET YOUR OPPORTUNITY 'CAUSE YOU'RE GOING TO BE IN JAIL BEFORE LONG, BECAUSE I GOT A CAR ON THE WAY TO YOUR HOUSE NOW.

V: OH, BUT YOU SAID THAT SO LONG AGO.

WO: NO. IT WASN'T SO LONG AGO. I TOLD YOU THAT ABOUT 15 MINUTES AGO. I HAVEN'T FORGOTTEN ABOUT YOU. DON'T WORRY.

V: ARE YOU GOING TO PROTECT MY MOTHER FROM EVIL?

WO: YEAH. WE'RE GOING TO PROTECTHER FROM YOU 'CAUSE YOU'RE THE ONE THAT'S SICK.

V: I KNOW. AIN'T THAT FUNNY?

WO: WHERE'S YOUR FATHER? IS HE STILL ALIVE?

V: SO, ARE YOU GOING TO PROTECT MY MOTHER FROM EVIL?

WO: I'M SURPRISED YOUR MOTHER IS STILL ALIVE. I'M SURPRISED SHE HASN'T KILLED HERSELF WITH A SON LIKE YOU.

V: HMMMMM.

****

MO: CENTRAL DISPATCH.

V: ARE YOU GOING TO PROTECT MY MOTHER?

V: ********** JUST LET ME GO. I'LL BE ALLRIGHT IN THE MORNING.

MO: OK. GOOD. TAKE 3 ASPIRINS AND GO TO BED, SIR.

V: NO. JUST LET ME GO.

MO: OK BYE.

V: NO.

MO: YOU LIVE ON HURD ROAD.

V: NO. ARE YOU GOING TO PROTECT MY MOTHER FROM EVIL?

MO: OH YEAH. I'LL BE RIGHT OVER THERE. WHERE DOES SHE LIVE?

V: FUCK YOU. YOU SON OF A BITCH.

MO: UNAUDIBLE. FUCK ME? YOU CAN'T FUCK ME. I'M A MALE.

V: I WANT TO FUCK YOU ANYWAYS.

MO: OH DO YOU REALLY?

V: IN YOUR MOUTH.

MO: DO YOU REALLY?

V: I WANT TO SEE YOU..UNAUDIBLE.

MO: HEY, I GET OFF AT 7:00. MEET ME IN FRONT OF THE JAIL.

V: CRACK AND AIDS IS WINNING.

MO: MEET ME IN FRONT OF THE JAIL AT 7:00.

V: OH YOU REALLY DO WANT TO FUCK ME THEN?

MO: FIVE FOOT 10, 180 LBS., I DRIVE A BLACK MONTE CARLO. APP.77

V: THAT DOESN'T MATTER TO ME.

MO: LOOK, I JUST THOUGHT I'D TALK TO YA. IF YOU WANT TO GET INTO MY PANTS, THEN MEET ME.

V: I'D LOVE TO KILL YOU.

MO: KILL ME?..UNAUDIBLE..

V: NAW, I'D RATHER KILL YOU.

MO: OH, COME ON.

V: YES, I JUST LOVE TO KILL.

MO: WELL COME ON DOWN AND SEE ME TOMORROW MORNING. I GET OFF AT 7:00.

V: NAW.

MO: YOU WANT TOKILL ME, COME MY WAY.

V: YOU COME MY WAY.

MO: NO. NO. COME SEE ME.

V: HEAD NORTH. NORTH IS GOD'S WAY, AIN'T IT?

MO: YEAH.

V: HEAD WAY.

O: OK THEN. THE PHAROAH'S OF EGYPT ALWAYS HEADED NORTH. SO I'LL SEE YA.

V: OF COURSE THEY DID. OF COURSE... UNAUDIBLE.

MO: YOU'VE HEARD OF TUT, THE BOY KING? THE GUY DIED AT 19.

APP. 78

V: UM-HMM.

****

MO: CENTRAL DISPATCH.

V: WHO AM I TALKING TO?

MO: WHO IS THIS?

V: NO. WHO AM I TALKING TO?

MO: THIS IS OPERATOR 24.

V: I WANT TO KNOW WHAT'S YOUR NAME.

MO: THIS IS OPERATOR 24, WHO IS THIS.

V: NO, WHAT'S YOUR NAME?

****

MISSLES BOMBING SOUNDS

FIRST PART WAS UNAUDIBLE.

V: I HAVE A PROBLEM WITH VIOLENCE.

MO: UNAUDIBLE. I'M FROM IRELAND.

V: ARE YOU GOING TO FOLLOW THE NORTH STAR?

MO: YOU GOT IT. TELL ME WHERE TO FOLLOW AND I'LL MEET YOU THERE.

V: HURD ROAD.

MO: 266?

V: YES, EXACTLY.

MO: OK. I'LL SEE YA TOMORROW MORNING.

APP. 79

V: NO. TONIGHT.

MO: I'M WORKING.

V: THAT'S YOUR JOB.

MO: I KNOW, BUT I'LL SEE YOU IN JAIL.

V: ARE YOU GOING TO PROTECT MY MOTHER?

MO: WHAT'S HER ADDRESS...WHAT'S HER ADDRESS? HELLO? WHAT'S HER ADDRESS?

V: 666 HADES.

MO: 666 WHAT?

V: 666 HADES.

MO: WHERE'S HADES AT?

V: fuck you.

MO; YOU'D LIKE TO.

V: I'D LOVE TO.

MO: IS THAT YOUR FACE OR DID YOUR PANTS DROP, BUDDY? GO TO BED.

****

P: UNAUDIBLE

WO: HE LIVES AT 266 E. HURD ROAD.

P: NO. I DON'T KNOW HIM. 266 E HURD ROAD?

WO: YEAH, YOU KNOW THAT'S WHERE BILL YOUNG-/BLOOD LIVES OR THAT'S WHERE HE USED TO LIVE.

P: YEAH.

APP. 80

WO: THAT LITTLE PRICK'S BEEN CALLING US ON THE PHONE FOR HOURS.

P: FOR WHAT?

WO: DRIVING US NUTS. SO I SENT SCHAEFER AND WEIMAN OVER THERE. I WANT THEM TO ARREST HIM OR SOMETHING. CENTRAL TO 33 NEWPORT. YOU GOT A RESCUE CALL. VICTIM OF AN ASSAULT. 8345 NORTH DIXIE. 8-3-4-5 NORTH DIXIE.]/2 MIL NORTH OF SCHWAN CREEK ROAD. THEY WERE GOING TO WRITE A COMPLAINT ASKING ME TO COMPLAIN ABOUT A MISUES OF A COMMUNICATIONS DEVICE. THEN THEY HAD TO GO TO A CALL ON NORTH DIXIE, SO WE HAD TO CALL OFF THAT ONE, BUT I WAS THINKING IF THEY GO OVER THERE AND MAYBE THAT GUY WOULD TAKE A SWING AT THEM OR SOMETHING, THEY COULD BRING HIM IN.

P: WHAT WAS HE DOING WHEN HE CALLED?

WO: HE'S TALKING ABOUT HE'S GOING TO KILLUS AND HE'S A WEREWOLF AND HE'S POSSESSED. AND, AND...

P: I DON'T WANT TO GO OVER THERE, THEN.

WO: NO, I DON'T WANT YOU TO GO 'CAUSE YOU'RE BY YOURSELF. I'M JUST WONDERING IF YOU KNEW HIM OR NOT.

P: WE DON'T NEED ANYMORE WIERDOS.

WO: NO. NO. NO.

P: I CAN GO SPOTLIGHT HIS HOUSE IF YOU WANT. OR MAYBE YOU CAN GET VANDERCOOK.

APP. 81

WO: OK. I'LL TELL HIM WE'RE GOING TO SEND DEPUTY VANDERCOOK OVER THERE IF HE CALLS BACK. UM, HE'S GOING TO KILL US. TOWNEY TOLD HIM TO MEET HIM HERE IN FROM OF THE JAIL AT 7:00 WHEN HE GETS OFF WORK.

P: OH YEAH?

WO: LIKE A DUMMY.

P: UNAUDIBLE..HIS CAR OR SOMETHING.

WO: I DON'T KNOW. THE GUY IS GOOFY.

P: I'LL RIDE BY THERE A FEW TIMES.

WO: OK. THANKS.

P: BYE.

WO: BYE.

****

W: RECORDS.

M: HEY.

WO: YEAH.

M: ON THAT VREELAND THAT YOU LOOKED AT.

W: UH-HMM.

M: IS THERE A TELEPHONE NUMBER THERE?

W: I CAN PULL THE FILE AND CALL YOU RIGHT BACK.

****

VREELAND BREATHING HEAVY.

APP. 82

APP. 82

MO: YOU START WALKING, OK? WE'LL CATCH YOU LATER.

V: OH MY GOD, IT"S NICE.

MO: OK...HAVE A GOOD TIME.

****

WO: WHAT MOVIE ARE WATCHING?

V: THE BOOK OF LIFE.

WO: THE BOOK OF LIFE?

V: YEAH.

WO: OH, I'M SURPRISED YOU'RE NOT WATCHING THE THREE FACES OF DEATH OR SOMETHING.

V: I'M TELLING YOU RIGHT NOW...

WO: YEAH, YOU'RE TELLING ME. YOU'VE BEEN TELLING ME FOR THE PAST 20 MINUTES, YOU'RE GOING TO KILL YOUR MOTHER. I KNOW.

V: NO. KILL ME.

WO: WELL, WE MIGHT BE ABLE TO OBLIGE YOU.

V: I WANT TO MAKE YOU...UNAUDIBLE.

WO: YOU ARE GOING TO DO WHAT?

V: (GROANING) I DON'T LIKE IT...I DON'T LIKE IT...I DON'T LIKE IT...FUCK YOU... (HEAVY BREATHING)...UH...

WO: WHAT?

V: WELL, IT'S AFTER MIDNIGHT

APP. 83

WO: UH-HUH.

V: I'M GONNA BE WALKING...UNAUDIBLE.

WO: YEAH. YOU'RE GONNA GO. WHAT'S YOUR MOTHER'S ADDRESS? 775 E.OUTER DRIVE? IS THAT WHAT YOUSAID? SHOULDN'T IT BE FOUR DIGITS ON E. OUTER DRIVE?

V; UNAUDIBLE.

****

V: HELLO, I'M GOING TO BE STRAIGHT UP WITH YOU. ALL RIGHT? UM... I DON'T KNOW IF I'M LOSING MY FUCKING MIND. I DON'T KNOW WHAT THE FUCK'S HAPPENING WITH ME ANYMORE. BUT, UH...

WO: GO AHEAD.

V: IT FEELS LIKE THIS EVIL FORCE IS COMING. I DON'T KNOW WHERE IN THE FUCK THIS THING IS, UH.. I JUST KNOW THERE'S SOMETHING UH..DRIVING ME TO, UH...KILL MY OWN MOTHER.

WO: OK. AND WHAT DO YOU WANT THE POLICE TO DO ABOUT IT?

V: MY MOTHER HAS ALWAYS... MY MOTHER HAS BEEN GOOD.

WO: UH-HMM. WELL YOU WERE THE ONE WHO WAS TALKING ABOUT KILLING HER.

V: BUT I'M GONNA KILL AND THERE'S NO.. I'M GONNA...I'll PULL A GUN ON ANYBODY & I'LL KILL.

WO: OK. WHERE DO YOU LIVE?

V: FUCK YOU. APP. 84

WO: WEll, YOU'RE THE ONE WHO CALLED HERE. YOU'RE THE ONE WHO KEEPS CALLING HERE.

V: I'M GOING TO BE CARRYING A GUN.

WO: AND YOU'RE LEAVING YOUR HOUSE, WALKING, TO GO OVER TO YOUR MOTHER'S HOUSE TO KILL HERE, RIGHT?

V: YOU CAN'T STOP ME.

WO: I'M NOT GOING TO TRY TO STOP YOU. I COULD CARE LESS. WE'LL STOP YOU, DON'T WORRY ABOUT THAT.

V: I KNOW.

WO: YOU'RE...

V: I'M CARRYING A GUN.

WO: OK. WHAT KIND OF GUN?

V: 49 CALIBER.

WO: A WHAT KIND?...HELLO?...(GROANING BY VREELAND)...WHERE DI YOU GO TO SCHOOL? ...MARK?...MARK.

V: I'M COMING...OHHHHH...I'M COMING...I DON'T CARE IF YOU KILL ME. PLEASE KILL ME...WHO AM I TALKING TO?

WO: MARK...MARK.

V: WHO AM I TALKING TO?

WO: WHERE DID YOU GO TO SCHOOL?

V: HELLO? ...MUMBLING AND UNAUDIBLE.

WO: WHERE DIDYOU GO TO SCHOOL?

APP. 85

V: (MOANDING AND UNAUDIBLE) I CAN SEE THE BLUE...I CAN SEE IT.

WO: YOU CAN SEE THE BLUE WHAT?

V: THE BLUES...

WO: THE BLUE WHAT?

V: I CAN SEE IT.

WO: YOU CAN SEE THE BLUE WHAT?

NEW WOMAN'S VOICE: MARK, WHERE DI YOU GO TO SCHOOL?

V: IT'S REAL...

OLD WO: WHAT KIND OF BLUE CAN YOU SEE?

V: I DON'T FUCKIN' BELIEVE IT'S REAL.

OLD WO: WHAT KIND OF BLUE CAN YOU SEE?

V: I DON'T FUCKIN' BELIEVE IT'S REAL. YOU BETTER GOD DAMN BELIEVE IT'S REAL.

NEW WO: MARK?

V: (GROANING)...I CAN SEE IT COMING. I CAN SEE THE BLUE.

NEW WO: MARK...

V: WHO AM I TALKING TO?

NEW WO: MY NAME IS FAYE. WHAT SCHOOL DID YOU GO TO?

V: I CAN'T SEE THE BLUE ANYMORE. BUT IT'S REAL. I"LL TELL YOU ONE THING. IT'S ALL I HAVE LEFT TO SAY. IT'ALL THAT I HAVE LEFT TO SAY. IT'S THAT IT IS REAL. IT'S UH....

APR. 86

OLD WO: HEY MARK.

V: I DON'T KNOW WHAT IT IS.

OLD WO: MARK?

V: I CAN'T STOP...I'M COMING...I CAN'T STOP IT. IT'S NOTHING MAN CAN COMPREHEND. IT'S UH...IT'S REAL...UNAUDIBLE.

OLD WO: MARK...(VREELAND GROANING AND HUNG UP)

****

WO: CENTRAL 5 and 27.

M: YES.

WO: OK, UH, DID YOU DO THE THING WITH THE LIGHTS LIKE WE DISCUSSED ON THE PHONE? (THE REST WAS UNAUDIBLE BECAUSE OF OTHER TALKING)

****

WO: CENTRAL DISPATCH.

MAN: YES, I WAS WONDERING, COULD YOU SEND A SHERIFF'S CAR OUT HER TO 266 E. HURD ROAD?

WO: OK. WHAT'S THE PROBLEM?

M: OK. MARK VREELAND HAS BEEN STAYING WITH US. OK? AND HE'S BEEN DRINKING AND HE SAYS I LOVE YOU BILL, I LOVE YOU LINDA, MY DAUGHTER-IN-LAW, HERE. I DON'T KNOW HE GOT A HOLD OF ONE OF MY GUNS OR WHAT, BUT I WANT HIM PICKED UP.

WO: OK. HE'S BEEN CALLING US ALL NIGHT LONG. HAVE YOU BEEN THERE? YOU'VE BEEN SLEEP-ING OR WHAT?

APP. 87

APP. 87

M: I'VE BEEN SLEEPING.

WO: OK. HE'S BEEN CALLING US FOR THE PAST TWO HOURS.

M: HOW COME?

WO: WELLL, I DON'T KNOW. PROBABLY BECAUSE HE'S CRAZY.

M: YEAH.

WO: UM...

M: BECAUSES HE'S BEEN THREATENING TO KILL HIS MOTHER AND I'M NOT GOING TO BE BOTHERED WITH HIM. MY LITTLE GRANDSON JUST GOT HIT BY A CAR AND I DON'T NEED THIS SHIT.

WO: NO. OR WHERE DOES THIS GUY'S MOTHER LIVE, DO YOU KNOW?

M: WILLAVENE TRAILER PARK.

WO: OK. HE TOLD ME THAT SHE LIVED AT 775 E. OUTER DRIVE, BUT THAT'S NOT A GOOD ADDRESS.

M: WELL, I THINK IT'S 10 SOMETHING...IT'S ...UH, OUTER DRIVE. AS YOU GO INTO WILLAVENE TRAILER PARK, TURN LEFT AND TAKE THE FIRST LITTLE CURVE RIGHT THERE. SHE'S GOT A BLUE AND WHITE TRAILER. IT'S GOT AN EAGLE ON THE FRONT OF IT. NOW HE WAS IN TROUBLE HERE A WHILE BACK. YOU GUYS ARRESTED HIM OUT THERE.

WO: YEAH, I KNOW. HE JUST GOT ARRESTED A COUPLE OF DAYS AGO. WHAT'S THE LADY'S NAME?

M: FLORENCE.

APP 88

APP. 88

WO: FLORENCE VREELAND?

M: RIGHT. BUT, I DON'T KNOW, MAM. I JUST GOT UP OUT OF BED. HE WOKE US UP... BECAUSE WE'VE BEEN AT THE HOSPITAL EVER SINCE MY LITTLE GRANDSON GOT HIT.

WO: OK. DO YOU KNOW WHICH DIRECTION HE TOOK OFF WALKING ON YOUR STREET, SIR?

M: I DON'T KNOW.

WO: OK. WHAT'S YOUR TELEPHONE NUMBER.

M: 241-004 (THAT IS WHAT IS SAID)

WO: OK.

M: BECAUSE I'M NOT EVEN SURE A MAN LIKE UNAUDIBLE TOOK A GUN OUT OF THE HOUSE.

BACKGROUND NOISE...A MAN PULLED A GUN AND WE SHOT HIM...

WO: OH MY G...OK, UH...THANKS...WE GOT HIM... WE JUST FOUND HIM. THANK YOU...BYE-BYE.

****

THE UNIT WITH THE SUBJECT, IDENTIFY BY CAR NUMBER.

CAR OFFICER: 7

WO: UNAUDIBLE, RETAIN YOUR LOCATION.

CO: NO PROBLEM

WO: OK. START UP THAT WAY. BURKE, MONROE AND HURD, 1068 WITH A SHOT GUN. WE'VE BEEN DEALING WITH HIM ALL NIGHT LONG. APPROACH WITH CAUTION. 5127 KEEP US ADVISED. THE COUNTY AND STATE UNITS EMERGENCY TRAFFIC ONLY, EXCEPT FOR 10 AND 27.

C: ....25 CAR BEHIND US, A TWO MAN UNIT.

WO: CENTRAL 25, B-BOYS.

B: GO AHEAD.

WO: OK. I NEED YOUR ASSISTANCE...UNAUDIBLE ...SINGLE MAN; MENTAL SUBJECT WITH A SHOT GUN, NORTH MONROE AND HURD.

B: CLEAR.

WO: 5127, SECURITY STATUS.

C: HE'S OFF A WAYS DOWN THE ROAD. OK?

WO: OK. I'VE GOT 2 OTHER UNITS ENROUTE. JUST KEEP US ADVISED.

C: 7 TO CENTRAL. HE CAME ACROSS THE ROAD. HE'S...UH...WALKING TOWARDS MY CAR.

WO: 5110. YOUR LOCATION.
CENTRAL 25 B-BOYS. YOUR LOCATION PLEASE.

B: COMING UP ON THE 75 SANDY CREEK.

WO: 5127 SECURITY.

C: UNAUDIBLE.

WO: OK. I GOT A SINGLE MAN UNIT THERE NOW. HE SAID THE SUBJECT WAS APPROACHING HIS CAR WITH A WEAPON. OK. FOR THE UNITS RESPONDING TO THIS, I CANNOT STRESS, WE HAVE BEEN DEALING WITH THIS GUY ON THE PHONE ALL NIGHT LONG. PLEASE APPROACH WITH CAUTION. HE SAID HE WOULD NOT HESITATE TO KILL.
CENTRAL 5127 SECURITY STATUS.

C: EXACT LOCATION.

APP. 90

WO: OK. I LAST HAD HIM AT NORTH MONROE AND HURD. HE SAID HE WAS APPROACHING THE CAR WITH THE WEAPONG. CENTRAL 5127. OK. APPARENTLY HIS WEAPON IS POSSIBLY A 20 GAGE SHOTGUN.

C: WE GOT HIM IN SITE. WE'RE APPROACHING HIM NOW.

WO: OK. VERY GOOD.

C: CENTRAL FROM 25 B.

C: TO KEEP YOU UP-TO-DATE. SUBJECT IS STANDING WITH THE SHOTGUN. WE'RE TRYING TO ORDER IT OUT OF HIS HAND. HE'S DRINKING BEER OR SOMETHING. HE'S NOT LISTENING TO US.

WO: OK. YOU...UNAUDIBLE.

C: I'LL BE THERE SHORTLY.

WO: OK 11.

LONG PAUSE.

WO: 5110?

C: GET AN AMBULANCE OUT HERE.

WO: OK...CENTRAL 517.
AND 7 START UP THAT WAY.

C: IS THERE A PROBLEM?

WO: 5110.

C: WE DON'T NEED ANYMORE ASSISTANCE. WE NEED AN AMBULANCE.

WO: OK. WE'VE GOT AN AMBULANCE ENROUTE. 517. DISREGARD. WE GOT AN AMBULANCE ENROUTE.

C: UNAUDIBLE.

WO: 25 B.

C: UNAUDIBLE

WO: 5127.

C: GET A HOLD OF SOME KIND OF COMMAND OFFICER TO RESPOND OUT HERE.

WO: OK.....LONG PAUSE.....5127.

C: GO AHEAD.

WO: OK. YOUR AMBULANCE IS RESPONDING FROM MERCY. THE OTHER SHERIFF IS ENROUTE, WOULD YOU LIKE A RESCU SQUAD?

C: THE AMBULANCE SHOULE BE OK.

C: UNAUDIBLE...I'M BRINGING DRIVER 27 INTO THE OFFICE. WAIT THERE.

WO: OK.

C: CENTRAL 25 B-BOYS.

WO: CENTRAL 25 B.

C: WE WILL BE BRING IN 1511'S PRISONER.

WO: OK. THANK YOU.

UNAUDIBLE THROUGH TONE.

C: CENTRAL DISPATCH.

WO: 11.

C: CHECK WITH COMMAN, BUT I BELIEVE YOU'RE GONNA NEED..UNAUDIBLE..TO HANDLE THIS PROPERLY.

WO: YEAH, WE'LL TRY TO GET IT TAKEN CARE OF.

(END OF TAPE)

(3)

Supreme Court, U.S.
FILED
SEP 28 1993
OFFICE OF THE CLERK

No. 93-352

In The

Supreme Court of the United States

October Term, 1993

MARK E. VREELAND, *Petitioner,*

v.

JAMES TOWNSEND; LYNN HARDAWAY; DONALD HORVATH; PAT LAUWERS; JAMES GRUBER; RICHARD SWEAT; VINCENT BURKEY; DANIEL BALINO; MONROE COUNTY CENTRAL DISPATCH; MICHAEL MURPHY; WILLIAM FREY; MONROE COUNTY PROSECUTOR'S OFFICE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS', TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BALINO, MONROE COUNTY CENTRAL DISPATCH, FREY, AND MONROE COUNTY PROSECUTOR'S OFFICE,

BRIEF IN OPPOSITION

TO PETITIONER'S REQUEST FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE MONROE COUNTY CENTRAL DISPATCH AND THE MONROE COUNTY PROSECUTOR'S OFFICE WERE IMPROPERLY NAMED PARTY DEFENDANTS?

II.

WHETHER RESPONDENT PROSECUTOR, WILLIAM FREY, WAS ENTITLED TO ABSOLUTE IMMUNITY AND THUS, DISMISSAL FROM THE PETITIONER'S COMPLAINT AS A MATTER OF LAW?

III.

WHETHER THE PETITIONER FAILED TO STATE OR SUPPORT A CLAIM AGAINST MONROE COUNTY FOR A CIVIL RIGHTS VIOLATION PURSUANT TO 42 U.S.C. 1983?

IV.

WHETHER RESPONDENTS WERE ENTITLED TO DISMISSAL OF THE STATE LAW CLAIMS AGAINST THE MUNICIPALITY, THE RESPONDENT PROSECUTOR, AND THE INDIVIDUAL DEPUTIES AND DISPATCHERS?

V.

WHETHER THE INDIVIDUAL DISPATCHERS AND DEPUTIES WERE ENTITLED TO SUMMARY JUDGMENT?

VI.

WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT FURTHER DISCOVERY WAS UNWARRANTED UNDER THE FACTS OF THE INSTANT CASE?

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MARK E. VREELAND, *Petitioner,*

v.

JAMES TOWNSEND; LYNN HARDAWAY; DONALD HORVATH; PAT LAUWERS; JAMES GRUBER; RICHARD SWEAT; VINCENT BURKEY; DANIEL BALINO; MONROE COUNTY CENTRAL DISPATCH; MICHAEL MURPHY; WILLIAM FREY; MONROE COUNTY PROSECUTOR'S OFFICE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS', TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BALINO, MONROE COUNTY CENTRAL DISPATCH, FREY, AND MONROE COUNTY PROSECUTOR'S OFFICE,

BRIEF IN OPPOSITION

TO PETITIONER'S REQUEST FOR CERTIORARI

COUNTER-STATEMENT OF FACTS

On April 23, 1988, Petitioner suffered a temporary loss of his senses and control as a result of ingesting drugs and alcohol. Beginning at 1:53 a.m., he constantly called the Monroe County Central Dispatch. Respondents, TOWNSEND, HARDAWAY, LAUWERS and GRUBER, were on duty. (R.2, Plaintiff's Complaint, p. 3, ¶ 2). Petitioner informed the dispatcher that he was "possessed", felt a "force" from outer space, and made other comments allegedly showing that he was in "dire need of help". (R.40, Exhibit A, Supplemental Report, pp. 1, 51). Petitioner further alleged that the Respondent Dispatchers'

remarks and their tone of voice caused him to suffer a further loss of control which compelled him to leave his home with a can of beer and his shotgun. (R.2, Plaintiff's Complaint, p. 4, ¶ 3).

At 2:20 a.m., Respondent Hardaway finally obtained Petitioner's address. However, another emergency call was received and the available deputies were dispatched on that call. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, p. 1, ¶ 2). Deputy Bellino was asked to go to the Petitioner's home and check for activity. Dispatcher Hardaway recommended that Deputy Bellino, as a single unit, not approach the house because of the Petitioner's crazy conversations. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, p. 1, ¶ 2).

At 2:52 a.m., Dispatcher Hardaway spoke with the Petitioner again. The Petitioner informed Hardaway that he wanted to kill his mother, that he was going to walk to her house, and that he had a "45". He said that he would kill anyone who came near him and began moaning. Dispatcher Hardaway asked Respondent Gruber to pass this information along to Deputy Bellino. (*Id*, p. 1, ¶ 3).

At approximately 3:00 a.m., Deputy Bellino was dispatched to another location to assist in an uncontrolled "bonfire". (*Id*, p. 1, ¶ 4). At 3:10 a.m., Dispatcher Hardaway received a telephone call from Bill Younglove, who requested a car at 266 E. Hurd. Mr. Younglove believed the Petitioner had just left his residence, was possibly armed, and was going to kill his mother who lived in Willow Green. At that time, Deputy Bellino radioed that the Petitioner was located at Monroe and Hurd and that the Petitioner had a gun. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, pp. 1-2, ¶ 4).

While traveling north on N. Monroe, Deputy Bellino observed Petitioner walking south along the east shoulder of the road. He observed Petitioner carrying a rifle or shotgun over his right shoulder. Petitioner was

smiling, nodding his head, and was yelling at him. Deputy Bellino turned his patrol car around, shined a spotlight on Petitioner, and rolled down his window. Petitioner yelled "I'm evil and I'm going to kill you". Petitioner, holding the weapon waist-high, pointed it directly at the Deputy.[1]

Deputy Bellino immediately turned off the spotlight, contacted dispatch for back-up assistance, and backed the patrol vehicle to Hurd Road and positioned the vehicle facing southeast on West Hurd at N. Monroe. Petitioner was approximately one tenth of a mile north of Hurd Road.

Deputy Bellino turned off the headlights to the patrol vehicle and heard Petitioner yelling, "I'm evil, you're going to have to kill me". (R.40, Exhibit F, p. 3). Pointing the weapon at Deputy Bellino. Deputy Bellino loudly instructed Petitioner to freeze and drop his weapon, approximately fifteen times. Petitioner put the weapon back over his shoulder. (R.40, Exhibit F, pp. 3-4).

Deputy Bellino called Petitioner by name, pleading that he put down his weapon and talk. Petitioner continued to walk toward Deputy Bellino's position, continuously repeating "It's me or you, it's me or you." Respondent Bellino again pleaded with Petitioner to put down the weapon. Within 50 yards of Respondent Bellino, Respondent Bellino could see that Petitioner continued to advance with the weapon in front of him. (R.40, Exhibit F, p. 4).

Respondent Bellino fired a warning shot near Petitioner to stop his forward aggression. Petitioner hesi-

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[1] **Respondent, MICHAEL MURPHY, is employed by the Michigan Department of State Police and conducted an investigation into the series of events leading to the shooting of the Petitioner. (R.2, Plaintiff's Complaint, p. 8). Although Monroe County Sheriff Walter O. Trowbridge, Deputy Carl VanWert, Chief Canavel, and the 9-1-1 agency were named, these Defendants were dismissed on June 13, 1991 for lack of prosecution. (R.22, Order Dismissing Claims Against Trowbridge, 9-1-1 Agency, VanWert and Canavel.**

tated for a few seconds, but continued to walk toward Deputy Bellino. A state patrol unit had arrived from the north. He could hear the state officers yelling to Petitioner to drop the gun. Petitioner kept stating "I'm evil, I'm evil, I'm going to kill you. Shoot me, come on." Respondents Sweat and Burkey arrived and pulled up very close to where Petitioner was standing. Petitioner pointed the weapon at Respondent Sweat when he exited the patrol car. Respondent Sweat took cover using his patrol unit. (*Id*).

All law enforcement officers yelled at Petitioner to drop his weapon, but Petitioner refused and the stand-off continued for 2-3 minutes. Petitioner again pointed the gun at Respondent Bellino, then at Respondent Sweat, at the state officer, and again at Respondent Sweat. Petitioner continued this process, each time flinching forward as if to shoot, but he did not fire. Petitioner started walking toward Respondent Bellino. When within 20 feet of Respondent Bellino, he was again ordered to stop and drop his weapon, but he did not and pointed the gun directly at Deputy Bellino. His attempt to fire was unsuccessful. (R.40, Exhibit E, pp. 4-5). Deputy Bellino ejected the round and chambered another while Petitioner advanced, continuously stating "Kill me, shoot me, it's me or you." Deputy Bellino ordered Petitioner to stop and drop the weapon one final time. When Petitioner refused, Respondent Bellino fired one round at Petitioner, hitting him in the right arm, and knocking him down. (R.50, p. 5).

Exhibit J – Information Felony Sheets:

After review of Murphy's investigation materials, Respondent Prosecutor Frey sought and obtained a warrant charging Petitioner with two counts of Assault with a Dangerous Weapon (upon Respondents Bellino and Sweat) and one count of Felony Firearm. (R.40, Defs' Mot. for Summary Judgment, Information Felony). On April 26, 1988, Petitioner was arraigned and bond set.

On May 6, 1988, a preliminary examination resulted in a bind-over for trial on the three charges. (R.40, Exhibit K, Prel. Exam).

As evidenced by Exhibit K, pursuant to the agreement, Count IV was added charging Petitioner with Attempted Felonious Assault. Further to the *Amended Information*, (R.40, Exhibit J), Petitioner agreed to plead no contest to Count IV, and that the first three Counts (two Counts Felonious Assault and one Count Felony Firearm) would be dismissed. (R.40, Exhibit M, p. 5).

Prior to accepting this agreement, the Honorable William F. Lavoy, Monroe County Circuit Judge, conducted a lengthy hearing relative to Petitioner's understanding of the agreement, including the differences between a misdemeanor and a felony, and the fact that he would be waiving several rights guaranteed to him if he were to be tried on the original charges, including available defenses. (R.40, Exhibit M, pp. 4-5).

Petitioner indicated several times that he fully understood the consequences of his plea and his attorney informed the Court that, in fact, that morning he and Petitioner had reviewed the applicable statutes regarding Count IV of the Amended Information relative to the misdemeanor/felony question. (R.40, Exhibit M, p. 7). The Court accepted Petitioner's plea. Rescheduling the matter for 4:30 p.m. to permit preparation of the Presentence Report, Petitioner was sentenced to serve 340 days in the Monroe County Jail, with credit for 340 days served. He was advised of his appeal rights. (R.40, Exhibit M, pp. 12, 19).

INTRODUCTION

A. Standard Of Review

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion,

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts material. The moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. '[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . .' *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).
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> *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23; 106 S.Ct. 2548, 2552; 91 L.Ed.2d 265 (1986).

One of the principal purposes of the summary judgment rule is to "isolate and [dispose] of factually unsupported claims . . . ." 106 S.Ct. at 2553. The intent *not* to shift the burden to the defendant was bolstered by the fact that the federal district courts possess the power to enter a summary judgment *sua sponte*. *Id.* at 2554. *The burden remains upon the plaintiff* once the summary judgment is asserted to establish a genuine issue of material fact that would affect the outcome of the litigation. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248; 106 S.Ct. at 2505; 91 L.Ed.2d at 211. In the instant case, the trial court properly concluded that no outcome determinative fact was in dispute and thus, properly entered judgment for the Respondents. Therefore, Petitioner's Petition for Certiorari should be denied.

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REASONS FOR DENYING THE WRIT

I.

THE MONROE COUNTY CENTRAL DISPATCH AND THE MONROE COUNTY PROSECUTOR'S OFFICE WERE IMPROPERLY NAMED PARTY DEFENDANTS.

> Each organized county shall be a body corporate with powers and immunities provided by law.
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> Const. 1963, art 7, sec 1.

Authority for the offices of county sheriffs and prosecutors is found in the 1963 Michigan Constitution, Art 7, Sec 4. Pursuant to this authority, only the Monroe County Sheriff can organize and operate a system designed to dispatch his deputies in emergency situations. As a function of the Monroe County Sheriff, the Central Dispatch is only a department. Similarly, employees of a county prosecutor hold office at the pleasure of the prosecuting attorney. M.C.L. 49.35; M.S.A. 5.795. Neither the sheriff's department nor the prosecutor's office can be sued since they are administrative departments of the County and do not enjoy a separate legal identity.[2] Since the Monroe County Central Dispatch and Monroe County Prosecutor's Office are *not* separate entities, dismissal pursuant to the provisions the Federal Rules of Civil Procedure was appropriate.

II.

THAT RESPONDENT PROSECUTOR, WILLIAM FREY, IS ENTITLED TO ABSOLUTE IMMUNITY AND THUS, DISMISSAL OF THE PETITIONER'S COMPLAINT AS A MATTER OF LAW.

Respondent Frey is absolutely immune from liability under 42 U.S.C. 1983. In *Imbler* v. *Pachtman*, 424 U.S. 409;

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[2] Fed. R. Civ. P. 17(b); *Davis* v. *Chrysler Corp.*, 151 Mich. App. 463; 391 N.W.2d 376 (1986); citing *McPherson* v. *Fitzpatrick*, 63 Mich. App. 461, 464; 234 N.W.2d 566 (1975). *Rhodes* v. *McDaniel*, 945 F.2d 117 (6th Cir. 1991).

96 S.Ct. 984 47 L.Ed.2d 128 (1976), the Court held that a prosecutor enjoys absolute immunity from suit under 42 U.S.C. 1983, when he acts within the scope of his prosecutorial duties. 424 U.S. at 420.

In *Johnson* v. *Granholm*, 662 F.2d 449 (6th Cir. 1981), cert. den. 102 S.Ct. 2933 (1981), the strict standard stated in *Imbler* was adopted. Undisputedly, Prosecutor Frey was acting within the scope of those duties normally assigned to prosecuting attorneys under the laws of the State of Michigan. Respondent Frey had the discretion to institute the criminal proceedings against Petitioner. A prosecutor's discretion includes the decision to enter into and recommend acceptance of plea agreement.

Most importantly, Petitioner failed to present evidence establishing that Respondent Frey acted outside the prosecutorial function.[3] For that reason, the trial court properly granted summary judgment of this claim.

III.

THE PETITIONER FAILED TO STATE OR SUPPORT A CLAIM AGAINST MONROE COUNTY FOR A CIVIL RIGHTS VIOLATION PURSUANT TO 42 U.S.C. 1983.

A. Petitioner Failed To Plead Municipal Liability Because The Petitioner Could Not Establish An Affirmatively Adopted Unconstitutional Policy, Custom, Or Practice That Directly Caused The Injury.

Petitioner must prove that his injuries were the result of a custom, policy, or practice of the entity upon which its officers acted in order to prevail. *Monell* v. *Dep't of Social Services*, 436 U.S. 658; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978), stated that municipalities:

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[3] *Buckley* v. *Fitzsimmons*, ___ U.S. ___; 61 USLW 4713 (1993).

> Can be sued directly under Section 1983 for monetary, declaratory or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.
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> 436 U.S. at 690.

"Although practices of state officials could well be so permanent and well settled as to constitute a custom or usage with the force of law, a municipality cannot be held liable solely because it employs a tortfeasor." 436 U.S. at 691. The official policy or custom must be *the* "moving force of the constitutional violation . . ." A municipality cannot be held liable unless it has created an "official policy which is the equivalent of an affirmative act causally related to the incident". 436 U.S. at 695.

In *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985), the Court held that a single act of misconduct by a street officer was insufficient to impose liability against the municipality. The need for a *strong* "affirmative link" or "causal connection" between the policy and the claimed unconstitutional deprivation was recognized:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the unconstitutional deprivation . . .
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> *Tuttle*, 471 U.S. at 823-24.

The *Tuttle* Court was unwilling to extend liability to a municipality when its policies were constitutional on their face. A result to the contrary exposes municipalities to vicarious liability because every action by a municipal employee would find its eventual origin in a policy of the municipality. For that reason, the term "policy" must involve a "course of action consciously chosen from among various alternatives." *Id.*

In the instant action, Petitioner simply concluded that his civil rights were violated by all of the Monroe County Respondents. In fact, Petitioner failed to submit any support of an unconstitutional policy statement, policy, ordinance, regulation, or decision officially adopted or promulgated by Monroe County, its Sheriff, or Prosecutor. Thus, Petitioner failed to establish a cognizable 1983 claim against Monroe County, its Sheriff, or Prosecutor, and dismissal of Petitioner's Complaint was required.

B. No Constitutional Right Was Violated.

A special relationship to protect an individual has been recognized, however, only in those circumstances where there is physical control over that person's physical being, such as incarceration or involuntary commitment. (R.56, Magistrate's Report and Recommendation, p. 15 relying on *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189; 109 S.Ct. 998, 1004-1006; 103 L.Ed.2d 249 (1989).[4] The Sixth Circuit has not yet recog-

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[4] **The Michigan Courts have also refused to impose an affirmative duty to act in negligence cases or civil rights cases. In *Markis* v. *City of Grosse Pointe Park*, 180 Mich. App. 545; 448 N.W.2d 352 (1989), the plaintiff's car was struck by another vehicle two hours after the police officers had cited its driver for driving through a red light. Since the driver was visibly intoxicated at the time of the initial stop, the officers allegedly should have prevented her from further driving after she was issued that citation. The officer, however, was following a city policy prohibiting the detainment of residents suspected of drunk driving unless they were involved in either an accident or a high speed chase.**

nized a duty to protect a member of the general population from harm. *Walton* v. *Southfield*, 995 F.2d 1331 (6th Cir. 1993). There, the plaintiffs asserted that the officers caused their predicament.

In that matter, the Michigan Court of Appeals reversed the trial court order denying summary disposition finding that the facts did not create a special relationship to protect the plaintiff. Specifically, the officer's duty was owed only to the general public.[5]

In *Reeves by Jones* v. *Besonen*, 754 F. Supp. 1135 (E.D. Mich. 1991), the duty to protect or take affirmative action was not imposed where the football coach failed to prevent a "hazing" ritual that regularly occurred on the bus after each game:

> There is no indication in the facts before the court that [plaintiff's] participation was compulsory, or that riding the school bus on the night of October 17, 1986 amounted to "incarceration" or "involuntary commitment" or "police custody", or anything of that sort. In the absence of such state coercion, *DeShaney* makes clear that the Constitution imposes *no duty* on the state to care for plaintiff's safety.
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> *Reeves*, 754 F. Supp at 1140. (Emphasis added).

In *Balistreri* v. *Pacifica Police Dep't*, 855 F.2d 1421, 1425 (9th Cir. 1988), the plaintiff alleged a violation of her due process right to liberty resulted from the failure of the police to take steps to respond to continued threats, harassments, and/or violence toward her by her

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[5] **See also, *Isabella County* v. *Michigan*, 181 Mich. App. 99; 449 N.W.2d 111 (1989); *Eichhorn* v. *Lamphere School District*, 166 Mich. App. 527; 421 N.W.2d 230 (1987); *Morse* v. *City of Mt. Pleasant*, 160 Mich. App. 741; 408 N.W.2d 541 (1987), rev'd to argue, 431 Mich. 888-895; 432 N.W.2d 298 (1988); *Trimper* v. *Headapohl*, 434 Mich. 585; 450 N.W.2d 559 (1989); *Simonds* v. *Tibbitts*, 165 Mich. App. 480; 419 N.W.2d 5 (1987).**

estranged husband. The court refused to recognize a special relationship between the state official and a particular member of the public where no custodial or other relationship existed obligating the police to protect the victim's safety. The Court stated "[T]he state's awareness of the victim's plight, by itself, will not create a 'special relationship'." 855 F.2d at 1426.[6]

Respondents also incorporate by reference the Magistrate's authorities and arguments in her Report and Recommendation. Magistrate Morgan concluded that the cases relied upon by the Petitioner can be distinguished on the basis that all those cases involved the State intervention prior to the alleged injury. (R.56, Magistrate Morgan's Report and Recommendation, p. 16).

To impose liability through a special relationship in the instant case would be an unwarranted expansion of the federal civil rights law.

C. Petitioner Failed To Plead Or Support A Claim For Supervisory Liability.

As noted by the Magistrate's Report and Recommendation, liability of supervisory personnel would not lie in the instant matter because a plaintiff must show that the supervisor encouraged a specific incident of misconduct or in some way, directly participated in it. (R.56, Magistrate's Report and Recommendation, pp. 8-9, quoting *Bellamy* v. *Bradley*, 729 F.2d 416, 421 (6th Cir. 1984), cert. denied, 105 S.Ct. 156 (1985).[7]

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[6] **The court, however, concluded that the Restraining Order together with the defendants' repeated notice of Balistreri's plight was sufficient to state a constitutional violation based upon the failure to take reasonable measures to protect Balistreri from her estranged husband.**

[7] **See also M.C.L. 51.70; M.S.A. 5.863, which provides that a sheriff or sheriff's department cannot be vicariously liable for the acts of its deputies.**

Therefore, summary judgment was properly granted. Petitioner failed to establish any connection between the ultimate result and the supervisor's actions. No evidence of similar incidents was provided to the Court. *Tuttle*, *supra*. Petitioner failed to establish that any alleged tortious action by the supervisor occurred pursuant to any established policy or that his actions established policy.

Petitioner failed to establish a claim of improper supervision since Petitioner failed to establish a history of widespread abuse within Monroe County. Petitioner also failed to establish that these individually-named Respondents acted improperly in the past and were not disciplined. *Russo* v. *Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983). *Leach* v. *Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989). For all the above reasons, Respondents assert that the trial court properly granted summary judgment on this claim.

D. Petitioner Failed To Establish A Claim For An Alleged Failure To Train.

In *Canton* v. *Harris*, 489 U.S. 378; 109 S.Ct. 1197; 103 L.Ed.2d 412 (1989), the Court addressed the requisite standard consistent with the *Monell* rationale. A direct causal link between the alleged conscious decision *not* to train and the alleged constitutional deprivation must exist. The failure to train must amount to deliberate indifference to the rights of the people with the police come into contact. 109 S.Ct. at 1204.

The following criteria must be met for liability to attach in this circumstance:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks that the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suf-

> fice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program . . . To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under Section 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate accident . . . Thus, permitting cases against cities for their "failure to train" employees to go forward under Section 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities – a result we rejected in *Monell*, 436 U.S. at 688-694 . . . 109 S.Ct. at 1205-06.

Petitioner failed to support any inference that Monroe County made a decision not to train despite a recognized need. Petitioner failed to satisfy the constitutional standard required. *Canton*. Most importantly, Petitioner cannot identify the alleged deficiency was caused by the claimed deprivation. The evidence did not support any alleged prior knowledge of a similar problem and a deliberate decision to not train with respect to the constitutionally tortious actions. *Russo*, *supra*. For that reason, the trial court properly dismissed this claim.

IV.

RESPONDENTS WERE ENTITLED TO DISMISSAL OF THE STATE LAW CLAIMS AGAINST THE MUNICIPALITY, THE RESPONDENT PROSECUTOR, AND THE INDIVIDUAL DEPUTIES AND DISPATCHERS.

A. The Entity Was Entitled To The Complete Protection Of The Governmental Immunity Doctrine.

A political subdivision of the State of Michigan is absolutely immune from tort liability. M.C.L. 691.1407;

M.S.A. 3.996(107) provides that a governmental agency shall be immune from tort liability when it is engaged in the exercise or discharge of a governmental function. A "governmental function" is defined as "any activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." M.C.L. 691.1401(f); *Ross* v. *Consumers Power Co.*, 420 Mich. 567; 363 N.W.2d 641 (1984).

If the **general activity** in which the governmental agency was engaged at the time the tort was allegedly committed was authorized, then immunity attaches. *Smith* v. *Dep't of Public Health*, 428 Mich. 609; 410 N.W.2d 749 (1987); *Ross*, *supra*. In this case, police operations and the prosecution of Petitioner are the exercise of a governmental function. Thus, Monroe County, was absolutely immune from tort liability under Michigan law. *Meadows* v. *City of Detroit*, 164 Mich. App. 418; 418 N.W.2d 100 (1987).

The Respondent County could not be held responsible under the theory of *respondeat superior* for the claimed intentional torts of it's police officer in this case. *Slanga* v. *City of Detroit*, 152 Mich. App. 220; 393 N.W.2d 487 (1986), rev'd on other grounds, 429 Mich. 893 (1988). There, the plaintiff argued that intentional torts allegedly committed by governmental employees, including assault and battery, false arrest and malicious prosecution, were excepted from immunity under *Ross*, *supra*. In examining the question of vicarious liability for the City, the *Slanga* Court stated:

> Under *Ross*, *supra*, a governmental agency can only be held vicariously liable for the torts of its employees if the tortfeasor was acting during the course of employment and within the scope of his authority. Even if these two conditions are met, liability can only be imposed if the tortfeasor was engaged in a non-governmental or proprietary function or an activity which falls within a statutory exception.

> (I)f the activity in which the tortfeasor was engaged in at the time the tort was committed constituted the exercise or discharge of a governmental function . . . the agency is immune pursuant to section 7 (MCL 691. 1407; MSA 3.996(107)) of the Governmental Immunity Act . . .
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> *Slanga*, 152 Mich. App. at 224-225.

If, as Petitioner contends, the Officers committed alleged intentional torts, then they were not acting within the scope of their authority and the County of Monroe cannot be vicariously liable for her actions. Conversely, if the officers were acting within the scope of their authority, they were performing governmental functions and the County is likewise immune. Quite simply stated, municipalities cannot be held responsible for the alleged intentional torts of their employees.

B. The Individual Prosecutor Was Entitled To Absolute Immunity.

As with Petitioner's claims under 42 U.S.C. 1983, in the State of Michigan, a prosecuting attorney is absolutely immune from liability while performing prosecutorial functions and duties. *Payton* v. *Wayne County*, 137 Mich. App. 361; 357 N.W.2d 700 (1984), citing *Imbler* v. *Pachtman*, *supra*, wherein the Court of Appeals concluded:

> Thus, Michigan law also favors the *Imbler* policy of protecting the prosecutor's independence of judgment from harassment due to the constant threat of potential litigation . . .
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> 357 N.W.2d at 705.

As the highest elected official, County Prosecuting Attorney, Respondent Frey, is also **absolutely, governmentally immune** from Petitioner's claims:

> We therefore hold that judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort lia-

> bility whenever they are acting within their judicial, legislative, or executive authority . . . (Emphasis added).
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> *Ross, supra*, 420 Mich. at 592; 363 N.W.2d at 667.[8]

Petitioner's Complaint was based upon the actions of Prosecutor Frey taken during the fulfillment of his prosecutorial duties. Thus, Respondent Frey was entitled to dismissal as a matter of law.

C. Individual Deputies And Dispatchers Were Entitled To Summary Judgment As A Matter Of Law.

1. INDIVIDUAL RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT OF ANY STATE TORT CLAIMS BECAUSE THEIR DUTY IS NOT OWED TO ANY PARTICULAR PLAINTIFF, BUT TO THE GENERAL PUBLIC.

Respondents adopt by reference the Arguments and authorities cited herein which are incorporated by reference for purposes of this Argument. See Argument V, subsection C(1). Duty is a necessary element to set forth a cognizable claim of negligence. *Moning* v. *Alfono*, 400 Mich. 425, 437; 254 N.W.2d 759 (1977). Duty is defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct towards another." *Eichhorn, supra*. Absent a special relationship between parties, a public official owes a duty to the general public and not to any one individual in society. *Markis, supra*.

After receiving several obscene, menacing, and threatening phone calls from Petitioner, some perhaps, unprofessional remarks were made by the Respondent dispatchers. However, Petitioner has failed to establish a special relationship existed between Petitioner and the

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[8] **See also *Meadows* v. *Detroit*, 164 Mich. App. 418; 418 N.W.2d 100 (1987); *Marrocco* v. *Randlett*, 431 Mich. 700; 433 N.W.2d 68 (1988); *Bischoff* v. *Calhoun County Prosecutor*, 173 Mich. App. 802; 434 N.W.2d 249 (1988); and *Washington* v. *Starke*, 173 Mich. App. 230; 433 N.W.2d 834 (1988).**

Respondent dispatchers during the thirty-five plus telephone calls. These dispatchers had a duty to the general public to keep these lines clear.

Petitioner has failed to show how the comments made by the Respondent dispatchers actually forced or caused him to leave his home with the shotgun and a beer for the purpose of initiating a confrontation in an attempt to be shot and killed by any officer. *Poe* v. *Detroit*, 179 Mich. App. 564; 446 N.W.2d 523 (1989).

2. THE INDIVIDUALS WERE ENTITLED TO GOVERNMENTAL IMMUNITY.

The individual deputies and dispatchers would be entitled governmental immunity as a lower level employees under the applicable test which is set forth as follows:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment, of service or volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (a) The officer, employee, member of volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) The officer's employee's member's or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.
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> MCL 691.1407(2)(C); MSA 3.996(107).

Since no gross negligence can be established, no claim in avoidance of governmental immunity can be established. See *Montgomery* v. *Detroit*, 181 Mich. App. 298; 448 N.W.2d 822 (1989); *Vermilya* v. *Dunham*, 195 Mich. App. 79; 489 N.W.2d 496 (1992).

3. NO CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAN BE ESTABLISHED.

Respondents rely on the Magistrate's Report and Recommendation for the position that the Respondents' conduct did not rise to the level to constitute an intentional infliction of emotional distress tort. *Tope* v. *Howe*, 179 Mich. App. 91, 107; 445 N.W.2d 250 (1989). Determining that the words used in these circumstances did not amount to outrageous or atrocious conduct, but were merely trying to make the Petitioner stop calling 911. (R.56, Magistrate's Report and Recommendation, p. 22-23).[9]

4. NO CLAIM FOR DEFAMATION CAN BE ESTABLISHED.

In order to state a claim for defamation, plaintiff must demonstrate:

> (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to

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[9] **See also *Tope*, *supra*; *Hall* v. *Citizens Ins. Co. of Michigan*, 141 Mich. App. 676, 684; 368 N.W.2d 250 (1985); *Hall* v. *Pizza Hut of America, Inc.*, 153 Mich. App. 609, 616; 396 N.W.2d 809 (1986); and *Coogan* v. *City of Wixom*, 820 F.2d 170, 174 (6th Cir. 1987).**

> negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special arm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).
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> *Rouch* v. *Enquirer & News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245, 252 (1986) citing, 3 Restatement Torts 2d § 558; and *Postill* v. *Booth Newspapers*, 118 Mich. App. 608, 618, 325 N.W.2d 511 (1982).

The Report and Recommendation concluded that Plaintiff alleged only that a false and defamatory statement was made about him. Plaintiff also failed to allege that Defendants' publication was defamation per se or that he has suffered any harm. Plaintiff failed to allege any facts to support a defamation claim. (R.56, Magistrate's Report and Recommendation, pp. 23-24).

Respondents hereby incorporate by reference the authorities and arguments relied upon by Magistrate Morgan in support of the dismissal of the claim for defamation.

V.

INDIVIDUAL DISPATCHERS AND POLICE OFFICERS WERE ENTITLED TO SUMMARY JUDGMENT.

A. The Allegations Against The Individuals Rose To The Level Of Negligence Only And Failed To Establish A Constitutional Violation.

42 U.S.C. 1983 provides a cause of action for the deprivation of rights, privileges or immunities secured by the constitution and laws of the United States.[10] Petitioner

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[10] *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144; 90 S.Ct. 1598; 26 L.Ed.2d 142 (1970); *Monroe* v. *Pape*, 365 U.S. 167; 81 S.Ct. 474; 5 L.Ed.2d 492 (1961); *Parratt* v. *Taylor*, 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981); *Gomez* v. *Toledo*, 446 U.S. 635; 100 S.Ct. 1920; 64 L.Ed.2d 572 (1980).

alleged that Respondents, Townsend, Hardaway, Lauwers, and Gruber, as the dispatch operators on duty April 23, 1988, were negligent in their response to Petitioner's thirty-five plus telephone calls. However, Petitioner failed to allege which right, privilege, or immunity secured by the Constitution or laws of the United States was violated by the allegedly negligent acts of these Respondents. To the contrary, mere negligence by an official is insufficient to establish a constitutional deprivation.[11]

Moreover, suggestions of negligence is insufficient:

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law. *Daniels*, 474 U.S. at 332.

In order to establish a constitutional violation recognized under 42 U.S.C. 1983, an intentional deprivation must exist. In *Daniels*, *supra*, the Court stated:

> . . . Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law and laying down rules of conduct to regulate liability for injuries that attend living together in society . . . 474 U.S. at 332.

Although the holding in *Daniels* applied to due process claims under the 14th Amendment, the Court's intention is clear. The Constitution of the United States is not intended to provide potential plaintiffs with constitutional claims which are based on an array of tort concepts available to claimants under state law. Rather,

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[11] *Davison* v. *Cannon*, 474 U.S. 344; 106 S.Ct. 668; 88 L.Ed.2d 677 (1986); *Daniels* v. *Williams*, 474 U.S. 344; 106 S.Ct. 662; 88 L.Ed.2d 662 (1986). See also *Moore* v. *City of Detroit*, 128 Mich. App. 491; 340 N.W.2d 640 (1983).

an intentional deprivation is required before an act will be scrutinized under a constitutional analysis.

Relying on *Davidson* v. *Cannon*, *supra*, the lower court also concluded that the allegation against the individual Respondents rise to the level of negligence only.[12] Relying on *Nishyama* v. *Dickinson Co., Tenn.*, 814 F.2d 277 (6th Cir. 1987), the Report and Recommendation stated:

> In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it was highly probable that harm would follow.
>
> (R.56, Magistrate's Report and Recommendation, p. 13, citing *Nishyama*, *supra*, 814 F.2d at 282).

Magistrate Morgan noted that Petitioner only identified one risk of harm that was made known to the deputies; Petitioner had threatened to kill his mother. That threat was corroborated and the individual Respondents responded promptly to that known risk. Petitioner's suggestion that the Respondents should have done something different without evidence that any plan of action would have altered the result was not presented. It was unclear, by any stretch of the imagination, that the acts of these particular Respondents proximately caused the ultimate confrontation by the Petitioner. Therefore, the trial court properly granted summary judgment on the basis that the Petitioner

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12 **See also, *Brandenburg* v. *Cureton*, 882 F.2d 211 (6th Cir. 1989). Evidence of "poor procedural preparation" prior to serving a warrant fails to support a violation of constitutional proportion.**

failed to state or support a claim that rose to the level of a constitutional violation.[13]

B. Petitioner Cannot Establish A Special Relationship To Support A Duty Of Care That Was Owed To This Specific Plaintiff Rather Than To The General Public.

The Petitioner asserted that the dispatchers had a special relationship with this particular Petitioner. In essence, the Petitioner concluded that the Petitioner's calls to the dispatchers imposed a duty upon the dispatchers to protect Petitioner from himself. (R.56, Magistrate's Report and Recommendation, p. 14).

Respondents adopt and incorporate by reference those arguments and authority asserting that these Respondents did not develop a special relationship for purposes of either civil rights or state tort liability. (See Argument III, B.)

C. No Constitutional Right Was Clearly Established At The Time Of This Occurrence.

If a constitutional deprivation did occur, then the question is whether the constitutional right was clearly established in the Sixth Circuit at the time of the alleged occurrence.[14] *Eugene D. By and Through Oliviad*

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[13] *Moore* v. *Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985), allegations of abandonment of a 15 year old did not rise to the level of a constitutional violation. There, the police officers left a 15 year old alone in a camper overnight after the arrest of her parents. The mother requested that her daughter not be left in the camper alone. The officers informed her that the minor could either stay in the camper or remain overnight in the squad car outside of the station. The mother concluded her daughter would be safer in the camper.

The court in *Moore* concluded that the facts of that case did not rise to the level of deliberate indifference sufficient to constitute gross negligence for purposes of finding a constitutional violation.

[14] See also, *Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991). The standard of review by the appellate court requires that, since qualified immunity is an issue of law, the review is *de novo*.

v. *Carmen*, 889 F.2d 701 (6th Cir. 1989) cert. den. ___ U.S. ___; 110 S.Ct. 1231; 110 L.Ed.2d 651 (1990). Since the Sixth Circuit has not recognized a constitutional deprivation arising out of the factual allegations against the individuals in the instant case, summary judgment was proper.[15]

> It is the plaintiff's burden to convince the court that the law was clearly established. *Id.* (citing *Lutz* v. *Weld County School Dist.*, 784 F.2d 340, 343-43 (10th Cir. 1986). In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. *Id.* (citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 & n.2, 107 S.Ct. 3034, 3039 & n.2, 97 L.Ed.2d 523 (1987). Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Hannula* v. *City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990). While the plaintiff need not show that the specific action at issue has previously been held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. *Id.* (citing *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039). The "'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039). If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the

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15 **Additionally, if the Court concluded that the individuals are entitled to qualified immunity on the basis that a violation of the constitutional rights was not stated or could not be supported, then it is not important whether the individuals acted pursuant to any alleged municipal policy and the entity cannot be liable either. *Rodgers* v. *Lincoln Towing Services, Inc.*, 596 F. Supp. 13 (N.D. Ill. 1984.)**

> plaintiff is not allowed to proceed with the suit. *Id.*
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> *Hilliard* v. *City & County of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991).

In *Hilliard*, plaintiff alleged that the defendant's failure to take her into protective custody pursuant to the Colorado's Emergency Commitment Statute violated her constitutional rights to life, liberty, travel and personal integrity. The plaintiff passenger, was left stranded by the defendant officers in a high crime area after her male companion, the driver, was involved in a minor traffic accident. The plaintiff was ordered *not* to drive because she was too intoxicated to drive. After she unsuccessfully attempted to telephone for help, she returned to her vehicle. "There she was robbed and sexually assaulted by a third party . . . she was found later the next morning, stripped naked, bleeding and barely conscious." 930 F.2d at 1518.

The *Hilliard* court concluded that, since the incident occurred in May, 1988, the alleged existence of a constitutional right to personal security had not been clearly established. Thus, the individual officers were entitled to qualified immunity.

Acknowledging that two appellate court opinions had recognized a right to personal security in instances where the plaintiffs were not confined or legally constrained, the *Hilliard* Court concluded that the existence of these two cases did not "clearly establish" that a personal security guarantee was warranted in a non-custodial setting in their circuit. In fact, the court recognized that many circuits refuse to recognize a constitutional duty on the part of the state or local governments to rescue their citizens. *Id.* Moreover, the Court in *DeShaney*, *supra*, stated that a "state or local government is not required under the Due Process Clause of the Fourteenth Amendment to protect its citizens from private violence, 'or other mishaps not attributable to the conduct of its employees.'" 930 F.2d at

1520, citing *DeShaney*, 489 U.S. at 193-94, 109 S.Ct. at 1002. Therefore, as a result of inconsistent decisions by the district courts, and the United States Supreme Court's pronunciation to the contrary, the Court in *Hilliard* was unwilling to recognize a constitutional violation under those circumstances.

Acknowledging the egregious burden placed upon entities by imposing an affirmative governmental duty to provide citizens with protection, the courts have been extremely cautious in separating those individuals subject to custodial care from the individuals, who are third-party bystanders. *Courson* v. *McMillian*, 939 F.2d 1479, 1497 (11th Cir. 1991), n. 31[16].

In the instant case, Respondents respectfully submit that this Court should follow the holdings and reasoning in *Courson* and *Hilliard*. Assuming for purposes of argument only that a constitutional deprivation occurred, that constitutional right to protection was *not* recognized by the Sixth Circuit at the time of this incident. Therefore, the individual dispatchers would be entitled to qualified immunity as a matter of law.

D. The Actions Of The Individuals Were Reasonable.

When law enforcement officers act in an objectively reasonable manner, they will be entitled to qualified immunity. *Malley* v. *Briggs*, 475 U.S. 335; 106 S.Ct. 1092; 89 L.Ed.2d 271 (1986).

In *Anderson* v. *Creighton*, 483 U.S. 635; 107 S.Ct. 3034; 97 L.Ed.2d 523 (1987), the Supreme Court stated:

> The general rule of qualified immunity is intended to provide governmental officials with

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16 **In *Courson*, the court determined that the officers were entitled to qualified immunity because the law was not clearly established at that time. Thus, the evaluation of the conduct against an unknown legal standard was deemed impossible.**

> the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages. (Citations omitted). Where that rule is applicable, official can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule, without entangling themselves in the vagaries of the English and American common law. 107 S.Ct. at 3040.

Relative to the claims of excessive force, the clearly established law has been set forth in *Graham* v. *Connor*, 490 U.S. 386; 109 S.Ct. 1865; 104 L.Ed.2d 443 (1989), where in the Supreme Court has set forth the following criteria for determining whether the Fourth Amendment has been violated:

> . . with respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" *Johnson* v. *Glick*, 4812 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.
>
> 109 S.Ct. at 1878-79.

The record before this Court reflects that on April 23, 1988, all responding deputies requested that Petitioner drop his weapon. Although this request was repeated over and over, Petitioner continued to advance upon Deputy Bellino. Petitioner continued to threaten others with the gun. When Petitioner was within fifteen to twenty feet, Deputy Bellino fired at Petitioner, striking Petitioner's arm. Deputies Sweat and Burkey attempted to stop Petitioner's advance by verbal commands. Deputy Bellino reasonably believed his life was in danger because the Petitioner exhibited behavior that any reasonable officer would have perceived as life threatening. *Rhodes* v. *McDaniels*, *supra*.

At that time and in that place, Respondents Bellino, Sweat, and Burkey objectively, and in good faith, believed their actions were lawfully and properly executed in the performance of their duties. As the issue of "qualified immunity" is purely a question of law for this Court to decide, *Dominique* v. *Telb*, 831 F.2d 673 (6th Cir. 1987), Respondents Bellino, Sweat, and Burkey assert that the trial court's dismissal was proper on this basis. (R.56, Magistrate's Report and Recommendation, pp. 18-20).

VI.

THE TRIAL COURT PROPERLY CONCLUDED THAT FURTHER DISCOVERY WAS UNWARRANTED UNDER THE FACTS OF THE INSTANT CASE.

The trial court properly concluded that further discovery would not provide the Petitioner with any additional support. The Petitioner did have opportunity to conduct discovery. The trial court did not abuse its discretion in precluding any further discovery. See *Rhodes*, *supra*. There, the Court concluded that further discovery was not warranted although the complaint had only been filed for six months before the trial court dismissed the matter and precluded further discovery. In *Rhodes*, the plaintiff's decedent died as a result of a fatal shooting.

RELIEF REQUESTED

WHEREFORE, Respondents, TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BELLINO, MONROE COUNTY DISPATCH, PROSECUTOR WILLIAM FREY, and the MONROE COUNTY PROSECUTOR'S OFFICE, respectfully request that this Honorable Court deny Petitioner's request for Certiorari, affirming the trial court's Order Granting Summary Judgment to Respondents.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

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Dated: September 28, 1993